The Central Law Journal.

SAINT LOUIS, SEPTEMBER 7, 1877.

CURRENT TOPICS.

WHILST concurring fully in the two letters of Gov. Reynolds, printed elsewhere, we think he is altogether too polite towards the *Nation*. In our judgment, the renewal of the attack upon Judge Dillon by that journal was a piece of cold-blooded and studied malice, in searching for the motive for which we are driven to the reluctant conclusion that the same money which Cate has so lavishly expended in printing and scattering broadcast over the country pamphlet after pamphlet maligning Judge Dillon, has been used to subsidize its editorial columns. The facts which it professed to furnish from the record, some of them deliberate falsehoods and others half-truths ingeniously distorted so as to deceive and injure, must have been received second-hand from Cate or from some such person. For instance, no honest man with the record before him could have stated that the opposition to Pickering was withdrawn three months before his removal, when, in fact, on the very day of his removal a memorial of bondholders was presented to the court, protesting against his management.

A RECENT press telegram states that miners at La Salle, Illinois, who struck on July 27, have filed a petition in the United States Court at Chicago, asking the court to arbitrate on their grievances. Unless the mining property to which they have been attached is in the hands of receivers appointed by that court, the action of the miners is unintelligible. Even if the mine-owner were a citizen of another state, or of a foreign country, still there is no federal statute authorizing the federal courts to sit as arbitrator in such cases. Nor do we see how a case could be made showing a sufficient amount in controversy to give the court jurisdiction in any event. No person could be selected more fit to arbitrate in such an unfortunate difficulty than Judge Drummond, who is a most learned judge and excellent man; but even the consent of all parties could not confer jurisdiction on him to act officially; and if he acted unofficially, it is not perceived in what manner his decision could be enforced. In England a statute has existed for many years (5 Geo. 4, c. 96) providing for such arbitrations, but this statute worked badly, and was seldom resorted to, and has been superseded or supplemented by the 35 and 36 Vict., c. 46, which is said to work well.

EDWARD MCCRADY, Jr., a prominent lawyer of Charleston, S. C., has communicated an elaborate article to the *News and Courier* of that city, under the caption of railroad transportation, in which he maintains, from a constitutional standpoint, that all the railroads in that state are amendable to the authority of the legislature, and that the legislature should pass such laws as will prevent discrimination in rates, and compel railroads to carry at a uniform tariff. He says: "Whether it is best to fix a definite schedule for every item of freight, or to give the power to commissioners, within certain limits, to regulate these charges, is a question which should be carefully considered. But we trust that the legislature will, at its next session, definitely and distinctly enact that the railroads shall not charge more for carrying freight one way than for carrying it another; and that, allowing a reasonable difference between carrying long distances and short distances, they shall be compelled to carry at a uniform tariff, north or south, east or west, as their roads may run; that, in short, it will put an end to this system of "through freights" and "through lines," as now practiced, by which the roads of the state are used not for the benefit, but the injury, of its citizens." The question scarcely calls for an expression of opinion in a law journal. If it did, we should say that while it is impossible to overlook the enormous rascality which has characterized railroad management during the last few years, yet if the railroad is placed between the upper millstone of the granger and the nether millstone of the striker, it will certainly fare very badly. While this regulating business is going on, would it not be well to take hold of the newspapers? We notice that the great dailies charge as much per year as they did during the flush times of the war, while the cost of composition, paper, press-work, types, and all printers' supplies have been greatly reduced. If there is anything that a free American citizen is entitled to be supplied with at a reasonable price, it is his morning paper before breakfast.

The case of *Ochse v. Wood*, recently tried before Sir James Stephen, as Commissioner of Assize, and a jury, at the Hertford Circuit, in England, has gained considerable notoriety, both on account of its affording a new application of an old principle of law, and on account of its intrinsic nastiness. We are concerned only with the question of law. The action was on a bill for £70, drawn by the plaintiff, Ochse, on the defendant, in July, 1876, and on a bill for £30 drawn by Osche on the defendant, in August, 1876—both overdue—and the plea stated that the first bill was accepted in consideration of the plaintiff agreeing to supply one Annie Bridgman, with a dress at a price equal to the amount of the bill; that she was at that time a prostitute, and known by the plaintiff to be so, and that the dress was to be so supplied by the plaintiff to Annie Bridgman, to be paid for by the bill, and for the immoral purpose of enabling her to make a display, and of assisting her and facilitating her success in and in pursuance of her immoral calling as a prostitute; that the plaintiff had full knowledge of, and was a party to this immoral purpose, and that there was no other consideration for the bill. The plea further stated as to the other bill, that it was given in the same way for a dress for one Lily Murray, and that she, in

like manner, was a prostitute, and that the dress was for the immoral purpose of enabling her to make a display, and of assisting her and facilitating her success in her immoral calling as a prostitute; that the plaintiff had full knowledge of, and was a party to this purpose, and that there was no other consideration for the bill. These pleas were denied. The defense was substantially made out by the testimony. The learned Commissioner, in summing up the case to the jury, told them that the law was this: "That persons who supplied articles for an immoral purpose, knowing that they were to be used for such purpose, could not recover the price. And the supply of articles of dress such as would contribute to the promotion of immoral intercourse, with the knowledge that they were going to be used for that purpose, would be an immoral transaction. If, therefore, the plaintiff agreed to supply these articles knowing that they were to be given by the young gentlemen to the women as the price of immoral intercourse with them, that would be an immoral consideration, and the defense could be sustained. The jury had been asked not to give effect to the disgust and indignation which must naturally be aroused in their minds by the disclosure of these foul matters, lest their minds should be prejudiced and because it was said the defense was 'discreditable.' No doubt the facts to which the young man had deposed, were discreditable in the highest degree, and no doubt to the end of his life he would feel bitter remorse at the years of profligacy he had wasted, and would have to undergo bitter sufferings in various ways before he expiated, as it was to be hoped he might ultimately expiate, the follies of his youth, though if he succeeded in doing so he would be more fortunate than many a better man. No doubt this was sadly discreditable, but it was quite another thing to say that the defense to this action was discreditable. Discreditable, indeed, if it was false and untrue; but if it was true, if these persons who were supplying women of wealth—many of them no doubt respectable—with dresses, upon which monstrous and outrageous sums were squandered; if they were, in fact, adding to their business the shameful business of pandars, was it discreditable to a man to stand up in a court of justice and say: 'You may cover me with shame for my past life, but you shall no longer rob my father by your business?' Was that discreditable? The credit or the discredit of it, in truth, would depend upon the verdict. One side or other in the case must leave the court in disgrace. The defendant, no doubt, has had to admit much that was disgraceful. It is for you to say whether the plaintiff has incurred a disgrace of a still deeper dye, and whether the defense is made out that this man knew perfectly well what was the nature of the avocation followed by these women, and for what purpose they required these gaudy and expensive dresses, and whether he did not know that they were to be used in carrying on their avocation. If you believe that this is made out, then there is disgrace and shame enough in the case, but more upon the persons who supplied the dresses than on the person who ordered them. If the jury were satisfied that the dresses were supplied, knowing that they would be worn and used for the purpose of attracting men in the pursuit by these women of their disgraceful avocation, then they would find for the defendants." The jury at once found for the defendants. The learned commissioner immediately gave judgment for the defendants. The *Daily Register* cites, on this subject, Kreiss v. Seligman, 8 Barb. 439; Tracy v. Talmade, 14 N. Y. 162; Trovinger v. McBurney, 5 Cow. 253; Steinfeld v. Levy, 16 Abb. Pr. N. S. 26; Boyce v. The People, 55 N. Y. 644.

ENGLISH AND AMERICAN LAW.

III—INTEREST, STAY LAWS, MECHANICS' LIEN LAWS, MARRIED WOMEN'S LAWS, HOMESTEAD LAWS, ETC.

In many of the states there are traces in their laws of the disfavor with which usury was regarded in England. The rate of interest is fixed in most of the states, and in some of them a maximum rate is stated, and any excess can not be recovered. In Tennessee, the rate is fixed at 6 per cent.; in Michigan, at 7 per cent., but in either state parties may agree to any rate not exceeding 10 per cent., but any rate may, by writing, be agreed on.

Under our Resident Magistrates' Court Act, a magistrate has a discretion in giving time to a defendant to pay by installments the amount of the judgment. Occasionally the magistrate may refuse to give time, and sometimes when indulgence is given the debtor abuses it, and the creditor loses his money. There may be many cases in which time would be an advantage to all parties, and instances may not unfrequently occur in which a defendant has a friend who may become surety, but to whom it may be inconvenient to advance the money at once. In Wisconsin, execution on a judgment given in a lower court can be stayed on security being given for the amount of the judgment. In Indiana, on giving sufficient freehold security, execution on any judgment, except for debts for breach of trust, may be stayed. A similar law prevails in other states. The period during which execution is stayed is fixed, and is proportioned to the amount of the debt.

Although our Contractors' Debts Act, 1871, facilitates in many instances the recovery of wages due to workmen, it places the contractor in no better position than he was formerly, nor does it give the workmen any greater rights than their employer had. Indeed, the principle of the act is similar to that of the provisions of the Law Amendment Act, 1856, whereby money may be attached in the hands of a garnishee or sub-debtor. In America they have probably gone too far in their desire to protect contractors and workmen. In the State of Connecticut, contractors, when the value of the labor expended exceeds twenty-five dollars, have a lien for the sum owing on the land

on which the building has been erected, as well as on the building itself. Proceedings similar to the steps necessary to have a mortgage foreclosed may be taken to have the lien satisfied. Verified particulars of the claim and premises must be lodged with the town clerk of the city in which the building is erected within sixty days after the completion of the work. In Alabama, a similar lien exists unless the contractor has taken security, but the contract must be in writing and recorded within sixty days after it is made in the probate court of the county in which the work is to be done. In Illinois, sub-contractors, also, have a lien, but notice must be given to the owner within sixty days after the money has become due, and, if not paid within ten days after such notice, the debt must be sued for. The principle of this law is in force in almost every state and territory, but the procedure is not uniform. In some of the states a lien is also given to various other persons, such as wood-cutters, miners, etc. In regard to bankrupts, each state has power to pass bankrupt and insolvent laws, which, however, may be modified or abrogated by any general law on the same subject passed by Congress. Provisions exist in the several bankruptcy laws in force in the various states whereby in some instanees a large portion of the debtor's property is absolutely protected against the claims of the creditors. Under our own Debtors' and Creditors' Act, 1875, a debtor is entitled to retain as his own property the tools (if any) of his trade, and the necessary wearing apparel and bedding of himself, his wife and children. However, this provision bears no comparison with what is termed the exemption and homestead law in America. It would occupy too much time to give even an outline of this law, and I shall, therefore, only refer somewhat particularly to the rule in force in the State of Michigan. A householder is entitled to a homestead not exceeding in value fifteen hundred dollars; also, sewing machine, wearing apparel, books, pew, etc., not exceeding one hundred and fifty dollars; two cows, five swine, household furniture, fuel for six months, not exceeding in all two hundred and fifty dollars; implements, horses, harness, etc., sufficient to allow the debtor to carry on his business, not more than two hundred and fifty dollars in value, provisions, feed, etc., for six months. In New York, the residence of the debtor, being a householder, is exempt to the value of one thousand dollars, and also a very large quantity of chattels, such as household furniture, library, tools, apparel, watch, etc., etc. In California, chairs, books, etc., not exceeding two hundred dollars in value, are exempt; homestead, not exceeding five thousand dollars; the cabin or dwelling of a miner, not exceeding five hundred dollars; also, a number of other articles, such as tools, household furniture, etc., etc. In Vermont, a homestead to the value of five hundred dollars is exempt; also, household furniture, sewing machine, one cow, ten sheep, ten cords of firewood, twenty bushels of potatoes, three swarms of bees and hives, professional books, and instruments of physicians to a certain value; also, bibles and other books, etc.

The legal status of a married woman has long been a blot on the English law. Except in cases where the husband is legally dead, or the wife has obtained a protection order, she has in a court of law really no legal position. During marriage, her legal existence is suspended. Efforts have been made for many years in courts of equity to extend her rights in regard to property held to her separate use, as will be seen on reference to the important judgments of Lord Westbury, in Taylor v. Mead, 34 L. J. Chancery, 203, and Lord Hatherley in Pride v. Bubb, L. R. 7, ch. 64. These cases, however, decide no more than that she may dispose of her equitable estate in such property without her husband's consent.

It may be doubtful whether the Married Women's Property Protection Act, 1860, and the Amendment Act of 1870, were ever intended to apply to persons likely to become possessed of valuable property. The primary object of these acts was probably to protect the earnings of married women in indifferent circumstances who had to support themselves. The property of a married woman should be placed more directly under her own control, irrespective of the circumstance of having a drunken or cruel husband.

The American law on this subject is entitled to serious consideration. The policy of that law in nearly all the states is to place married women in the position of a *femme sole* in regard to all property belonging to her at the date of her marriage, or acquired by her during coverture. As a corollary to this position, she is entitled to sue, and is liable to be sued, in all matters relating to such property, as if she were unmarried. As a set-off against this, the husband is not liable for the debts owing by her at the time of the marriage. These general remarks are subject to many qualifications; for example, in Oregon it would appear that property acquired by gift, devise or inheritance only, is free from the husband's debts; and in Columbia property given by a husband to his wife remains liable for his debts. In California all property acquired during marriage by either party is common property, with absolute power in him to dispose of it during his life, but on his death she succeeds to the half of it. In Michigan a wife can contract with her husband in the same manner as she may do with a stranger, and she is under no disability in regard to such contracts. In Indiana, a widow who is entitled to property by virtue of her first marriage ceases to have any claim to it on being married again, and it thereupon belongs to her children by the first husband. The law in New York places the wife practically in the position of a *femme sole*. Moreover in the Province of Ontario (Statute 35 Vic. ch. 16, s. 2), a married woman may carry on business alone, and all profits, earnings, and property derived therefrom may be disposed of without her husband's consent. By section 3, she may insure her own life for the bene-

fit of herself and children, and the life of her husband with his consent. By section 8, he is not liable for the debts owing by her at the date of marriage, or incurred by her in carrying on business separately.

This branch of law has been very much altered in England within the last few years. The Married Women's Property Act, 1870, and Amendment Act of 1874, doubtless give substantial effect to the principle of the American law, to part of which I have briefly alluded, but these Acts are not in force in the colony, although it is to be hoped that the Colonial Legislature will without delay pass them in an amended form. In our law, the power to sell the lands of infants, unless affected with a trust or liable for debts, is unsatisfactory. A recent statute in England has altered the law on this head. In severel of the states authority is given to the guardian of an infant or the executors of the estate of a deceased person to sell land under the direction of a court. However, in several of the states, such a sale is prohibited by statute.

Provision exists under the New Zealand Lunatics Act, 1868, for selling land under the authority of the supreme court. If such a right is proper, it certainly would not be unreasonable to confer a similar jurisdiction on the court in cases of minors. I quite admit that such an authority may be injudiciously exercised, the proceedings being necessarily of an *ex parte* character, but on the other hand injustice and loss may occasionally take place in the absence of such a power, the exercise of which might well be surrounded by sufficient safeguards.

In many, if not all, of the states there is what is technically called a betterment law, the object of which is to protect persons who in good faith improve land which they believe to be their own. The owner of land on which improvements have been made is bound to pay the value of the improvements, unless he elects to have the land and improvements valued separately. Should the person claiming compensation refuse to purchase the land at the price at which it has been valued, he forfeits his right to compensation. In the Province of Ontario (statute 36 Vic., c. 22) a statute is in force having a similar object to those in force in several of the states. This betterment law is wider in its operation than the English rule of equity, which compels the real owner of property, who stands by and allows another person to expend money in improving the property, to compensate such person for the improvements, the reason being that the conduct of the real owner, under such circumstances, constitutes fraud. The English law on the subject will be found in the notes to the Earl of Oxford's case (2 Tudor's leading Cases in Equity). The chief distinction between the American and English law on this question is that, by the law of the former country, the real owner may be ignorant of the fact that his land is being improved, the courts looking almost entirely to the *bona fides* of the person expending the money; whereas, in England, the owner must have knowledge of, and wink at, the improvements whilst they are being made.

However tempting the occasion, I feel that time will not allow me to refer at length to several of the other important changes which have taken place in America,—the abolition of the law of primogeniture, which was of feudal origin, and the fusion of law and equity in most of the states, protection against unreasonable searches, and various other alterations and improvements well worth considering.

I trust that these remarks may at least prove suggestive, and should they be the means of directing your attention with still greater enthusiasm to the study of the laws in operation in America, I shall consider my labors abundantly rewarded.

WILLIAM DOWNIE STEWART.

DUNEDIN, N. Z., 1876.

BANKRUPT ACT—STATUTE OF LIMITATIONS.

PAYSON, ASSIGNEE, v. COFFIN

United States Circuit Court, District of Kansas, June Term, 1877.

Before Mr. Justice MILLER.

1. LIMITATION OF SUITS BY ASSIGNEES.—The two-years limitation provision in the bankrupt act applies to suits by assignees to collect the debts and assets of the state, as well as to suits relating to specific property.

2. SUITS BY ASSIGNEES, WHERE BROUGHT.—Suits may be brought in the Circuit Courts of the United States, by assignees in bankruptcy, without reference to the amount or value in controversy.

Action by Payson, assignee in bankruptcy of the Republic Insurance Company of Chicago, to recover a second assessment or call of the defendant as a stockholder in the bankrupt company. Plea that no cause of action hath accrued against the defendant within two years next before the commencement of this suit. Demurrer to plea.

Mr. Howell, for the plaintiff; *Mr. Wheat*, for the defendant.

Mr. Justice MILLER, orally delivering his judgment, held:

1. That the plea of the statute of limitations was sufficient in point of form.

2. That the plea was good in substance,—in other words, the two years' limitation in the bankrupt act applies to suits by assignees to collect the debts and assets of the estate, as well as to suits relating to specific property.

3. Whether the cause of action accrued until the *second* assessment (the one in suit) was made by the bankruptcy court, is a question which does not legitimately arise on the demurrer to the plea of the statute of limitations. Demurrer to the plea of the statute of limitations overruled.

It was also held by Mr. Justice Miller, on a demurrer to the petition in another case, that assignees in bankruptcy, under the bankrupt act as amended June 22, 1874, if not before, may sue in the circuit courts of the United States to collect assets and debts due the estate, without reference to the amount claimed; that the limitation of $500 in the Act of March 3, 1875, as to the general jurisdiction of the circuit courts, does not apply to such suits.

VENDOR'S LIEN—ESTOPPEL..

TREZEVANT v. BETTIS.

Supreme Court of Tennessee, September Term, 1876.

HON. JAMES W. DEADERICK, Chief Justice.
" PETER TURNEY,
" THOMAS J. FREEMAN,
" ROBERT MCFARLAND,
" J. L. T. SNEED, } Justices.

1. A VENDOR OF LAND may retain upon the face of his deed a lien for a debt due, which is no part of the consideration for the land.

2. THE VENDEE, though he do not sign the deed, will be estopped, by his acceptance of it, from impeaching the lien.

FREEMAN, J., delivered the opinion of the court:

This bill is filed to enforce a lien reserved in a deed conveying a lot of land near the city of Memphis to A. C. Bettis. It is filed against his widow, administrators and heirs. The deed was made by complainant and Amanda Trezevant. The lien retained on the face of the deed was for payment of a $1,200 note due N. M. Trezevant, was probably for borrowed money, but no part of the consideration for the land. It was not signed by the vendee.

The only question in the case is, whether such a lien is binding, creating a valid charge on the land as between vendor and vendee, or rather between the original parties or their representatives. The chancellor held it good, and, we think, correctly. The acceptance of the deed by Bettis, was an assent to the right reserved on its face, and he, as well as his heirs, is estopped from saying that he will take the benefit of the title and disaffirm the charge thus created by the terms of his contract. Such reservations of estates in lands and other property have been held good in Campbell v. Campbell, 3 Head, 328; and Walls v. Ward, 2 Swan, 648.

What might be the effect of this reservation as against creditors and purchasers, under our registration laws, may be a different question; but as to the parties to the instrument, there can be no question of the validity and binding force of the lien thus reserved.

The decree will be affirmed. The money must be paid in ninety days, or the land sold for its payment; and if any balance, then decree against administratrix for it, to be levied of assets of the estate; costs to be paid out of the fund, and to be paid in cash at sale; sale not to affect or bar the equity of redemption.

NOTE.—The estoppel in this case is of a somewhat peculiar character; and the question may arise whether it should be classed as an estoppel by deed, or by conduct. Mr. Bigelow's definition of an estoppel by deed is "a preclusion against the competent parties to a valid sealed instrument, and their privies, to deny its force and effect by any evidence of inferior solemnity." (p. 239.) This definition is broad enough to cover the deed in the principal case, and to apply to the grantee therein. But most of the cases cited by Mr. Bigelow, of estoppels by deed, show that the grantor was the party estopped; and among his limitations to the doctrine, is this, that if the instrument be the deed of the grantor only, as in the principal case, "the estoppel applies in general to the grantor, and does not reach the grantee." (p. 258-9.) But "the acceptance of a deed-poll, however, sometimes works an estoppel upon the grantee" (p. 259); citing Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, where the deed recited covenants on the part of the grantee, who was held bound thereby, although he had not signed the deed. To the same effect are Belmont v. Coman, 22 N. Y. 438, and Spalding v. Hallenbeck, 35 N. Y. 206.

As to the form in which Trezevant's lien was reserved in the principal case, Woburn v. Henshaw, 101 Mass. 193, seems in point; where a party holding a mill located on a canal, under a deed made by order of court, which bound him to keep the canal in repair, was not allowed to escape that duty on the ground that the order of the court was defective.

But the estoppel being predicated of the acceptance of the deed, the case would seem to fall technically under the rule applicable to estoppel by conduct. The doctrine most nearly in point seems to be that referred to by Mr. Bigelow on page 503, that one who accepts a beneficial interest under a will is held thereby to have confirmed and ratified every other part of the will, and can not be heard to set up any right or claim, how well otherwise it might have been founded, which would in any way defeat the will. See Brown v. Ricketts, 3 Johns. Ch. 553.

In 54 N. Y., *supra*, the principle that the grantee is bound by the recitals in the deed he accepts, is drawn from Sheppard's Touchstone, 177, and Greenleaf's Cruise's Digest, ch. 26, title 32, sec. 3. P.

PERSONAL INJURIES — CONTRIBUTORY NEGLIGENCE.

HARLAN v. ST. LOUIS, KANSAS CITY AND NORTHERN RAILWAY COMPANY.

Supreme Court of Missouri, April Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" W. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY, } Associate Justices.

IN an action to recover for the negligent killing of plaintiff's husband, the evidence tended to show the following facts: The deceased was struck and killed while attempting to cross defendant's railroad in a frequented path leading across the tracks; the day was clear, and the engine might have been seen for at least fifty yards from the point where the casualty occurred. The bell on the engine was not rung, but the bell of another engine standing in the yard near by was being rung at the time, which might have mislead the deceased if he had trusted to hearing alone; he could not have been seen after he passed upon the tracks in order to stop the train. *Held*, that although the defendant's employes were guilty of negligence in not sounding the bell on the engine which caused the injury, yet a verdict for the plaintiff was erroneous, on the ground of the negligence of the deceased in attempting to cross the tracks when he saw or might have seen the approaching engine. One who is about to cross a railroad track must look as well as listen; he must be vigilant and watchful, and the the failure to exercise such vigilance is negligence *per se*.

APPEAL from the Randolph Circuit Court.

NAPTON, J., delivered the opinion of the court:

The petition in this case was under the second section of the damage act, for the negligent killing of the plaintiff's husband by a locomotive of the defendant.

The answer of the defendant, after denying the allegations of the petition, sets up a defense that the plaintiff's own negligence was the cause of the disaster. The evidence in the case, in which there was no conflict, established the following state of facts: The deceased, who lived in the town of Moberly, was passing from the east side of the railroad, on a frequented path leading over the tracks, in the middle of a clear day in November, and was killed by what is called the pony-engine, running backwards on the main track. He stepped from behind some cars standing on the side-track, which was seven feet from the main track, and was killed by this engine almost immediately. He wore a fur cap with ears to it, but it seems from the testimony that his hearing and eyesight were ordinarily good. The bell on the pony-engine, having no rope to it, was not sounded by the engineer, and there was a freight train on the adjoining track, about fifty feet off, on which there was a bell ringing which could be heard all over the town.

The locomotive that killed Harlan could be heard, when in motion, without a bell, at a distance varying

from one hundred to two hundred yards. The engineer of this locomotive did not see Harlan till he was run over, the engine going backwards. The track was a straight one, and the engine could have been seen at a considerable distance. There was no possibility of stopping it, had the engineer seen Harlan before he was struck, so as to avoid the disaster that occurred.

The instructions given by the court to the jury were undoubtedly the law, and distinctly declared that the plaintiff could not recover if the disaster was produced by Harlan's own negligence, although the bell was not sounded, provided the engineer could not have prevented the accident. The jury, however, found a verdict for the plaintiff. The principles of law applicable to this case are so well established, that we deem citations of authority unnecessary. They are cited at length in the brief of appellant's counsel. A person who goes on a railroad track, or proposes to cross it, must use his eyes and ears to avoid injury.

A neglect of regulations in regard to bell-ringing may amount to negligence in law on the part of the railroad employees; but that does not absolve strangers, who propose to cross the track, from ordinary care. Indeed, every intelligent person who has arrived at years of discretion is presumed to know that it is dangerous to be on a railroad track. When trains are passing to and fro, and when crossing one, he is expected to be vigilant and watchful of the approach of a locomotive. The failure to exercise such vigilance is negligence *per se*. Conceding, in this case, that the failure to ring the bell was negligence on the part of the defendant's servants, yet Harlan could both see and hear the locomotive if he had looked or listened. And his stepping on the track, on the approach of the engine, at a slow rate of speed, appears unaccountable. He seems to have been either absorbed in thought, or concluded, after he saw the engine, that he could cross safely, although it was so near as to make the experiment exceedingly hazardous. The company are not responsible for the result of such experiment, unless the engineer, after seeing the hazardous position of Harlan, could have avoided injuring him. Of course no amount of negligence on the part of a stranger would authorize a railroad engineer to run over him, if there was a possibility of avoiding it; but it is proved in this case, by the plaintiff's own witness, that the engineer did not see Harlan until he was killed, and that, if he had seen him, there was no possibility of stopping the engine in time to have avoided the injury.

The failure to ring the bell on the engine, and the sound of bells on the freight train, might have misled Harlan, if he trusted to hearing alone, although the evidence on both sides clearly shows that the movements of the pony-engine without a bell could be heard at least fifty yards. This, however, does not account for the failure of Harlan to see the engine when he stepped from behind the cars on the side-track. He was seven feet still from the main track, on which the switch-engine was clearly in sight and in motion, and it was about the middle of a clear day, between 1 and 2 o'clock. He must, therefore, either have been totally absorbed on other subjects, or have concluded to take the risks. There is no ground for holding the railroad company responsible for the result of such recklessness. The circuit court might have refused to submit such a case to the jury, had an instruction to that effect been asked. Certainly a verdict against the instructions should have been set aside.

The questions discussed in this case in regard to the form of the petition, in view of the conclusion we have reached on the merits, we deem unnecessary to consider.

The judgment is reversed, and the case remanded. The other judges concur.

WITNESSING WILL — CONSTRUCTION OF STATUTE.

DEVENDORF v. DOWNIE.

Supreme Court of Wisconsin, January Term, 1877.

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE, } Associate Justices.
" WM. P. LYON, }

WITNESSING WILL—CONSTRUCTION OF STATUTE—DISCUSSION OF POWER OF COURT.—1. A person witnessing a will must sign it in the actual presence of the testator, so that the testator, if he desire, may see the act of signing. 2. Courts can only declare wha the law is; they have no power to make it what it ought to be.

There is no controversy as to the material facts. A few hours before his death, the deceased requested one Watson to write his will, and thereupon Watson wrote the instrument in question—the words of it being dictated by the deceased—read it over to him, and he signed it in the presence of Watson alone. Watson then asked if he should sign it. The deceased made no response but called his brother, George H. Downie, and requested him to witness a paper. George then signed the instrument in question in the immediate presence of the deceased, and Watson put the instrument in his pocket. After affixing his signature, George went into the adjoining room, to which Watson followed him a few moments later. Here George asked Watson if he had signed it, and Watson replied he had not. George then remarked that a will requires two witnesses, and went into the room where deceased was and asked him if Watson "witnessed the paper." Deceased said he had. George thereupon returned to the adjoining room, told Watson what deceased had said, and advised him to witness the instrument, and he did so. Watson affixed his name to the instrument in the room adjoining that in which the deceased was, and the latter could not see the act of signing from the bed on which the was lying. Watson then went into to the other room, sat on the bed of the deceased with the instrument in his hand, and said to deceased that he had signed as he supposed in accordance with his wishes, and deceased replied that it was all right.

LYON, J.:

There can be no doubt that when the deceased signed the instrument propounded as his last will and testament, and when the signatures of his brother George and Watson were appended to it, he was of sound disposing mind and memory. Neither is there any reason to doubt that the instrument expresses his real intention in regard to the disposition of his property after his death; and the record discloses no ground for suspecting that any injustice would be done to his heir-at-law should the instrument be established as his last will. Indeed, the case is singularly free of those extraneous circumstances often present in such cases which force the mind, however reluctantly, to contemplate possible wrong and injustice as the result of applying in its integrity a given rule of law. In such cases, impelled by what has seemed to them a persuasive justice, and with an exalted sense of the obligations which the deceased owed to his relatives or others, the courts have sometimes strained the law to make a will what it ought to be, rather than to execute the will of the testator as he made it. And so, likewise, wills have been denied probate, or admitted thereto, on grounds which would not have prevailed had the specific provisions of the instrument been regarded. Such cases have tended to unsettle otherwise well settled rules, and have furnished many illustrations of the legal proverb, "hard cases make bad law."

The statute we are to interpret is as follows: "No will made within this state, except such noncupative wills as are named in the following section, shall be effectual to pass any estate, whether real or personal, nor to charge, or in any way affect the same, unless it be in writing and signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed in the presence of the testator, by two or more competent witnesses." R. Stat. chap. 97, § 5.

The question presented by the appeal is, did Watson subscribe the instrument propounded as the last will and testament of Timothy C. Downie, in the presence of said Downie, within the meaning of the statute?

The provision of our statute, which makes it essential to the validity of a will that it shall be attested by witnesses in the presence of the testator, is taken from the English statute of 29 Car. II, ch. 3, § 5, which has also been adopted without material change (except as to the number of witnesses required) in most of the states of the Union.

The learned counsel for the respondent concedes that the English courts have uniformly held that unless the instrument be subscribed by the attesting witnesses in the conscious presence of the testator—that is, unless he may, if he choose, see the act of subscribing—it is not a subscribing in his presence within the meaning of the statute. An exception to this rule is made of necessity in case the testator is blind; but in such case it is held that the subscribing must be where the testator could see the act if he were not blind.

Many cases in this country asserting and applying the same rule are referred to in the brief of the learned counsel for the appellant. Thus we find an overwhelming weight in favor of the English rule—so overwhelming that as able and independent a jurist as was Judge Redfield was constrained to yield to it, although he believed the rule unsound.

But the learned counsel for the respondent argued with great force against the rule and eloquently appealed to us to overthrow it in this state, and establish the more just and reasonable rule for which he contended. We have been prompted in consequence to consider with much care whether this is a case which will justify us in overthrowing a specific rule of statutory construction, established and upheld by such great weight of authority. We do not see our way clear to do so. We may concede that the rule is unsound in principle, still it is a rule affecting the descent and testamentary disposition of property, and was established long before our statute of wills was enacted. It is a rule to which the maxim *stare decisis* is peculiarly applicable. To unsettle it now by judicial decision would be to unsettle a long and well established rule of property, which should never be done but by the legislature. To do so would be to add another to the list of cases already mentioned, in which the law has been warped and even perverted to accomplish what was supposed to be just and equitable, and to avoid the opposite. Thus, to unsettle the law, even in the supposed interests of justice, is always perilous, often disastrous, and never justifiable. If the law is wrong it is the duty of the legislature, not the courts, to correct it. The courts can only declare what the law is. They have no power to make it what it ought to be.

In the light of these fundamental principles we can only apply to this case the governing rule of law as we find it. We must hold, therefore, that the instrument propounded as the last will and testament of the deceased was not subscribed in his presence by the two witnesses whose names are appended to it, but only by one of them, and hence that the same should not be admitted to probate.

VERDICT OF COURT UPON FACTS—USURY—SALE OF GOLD.

AUSTIN v. WALKER.

Supreme Court of Iowa, March Term, 1877.

1. VERDICT—FINDING OF THE COURT.—The findings of the court upon questions of fact, are entitled to the same presumptions as the verdict of a jury, and will not be disturbed, unless unsupported by the evidence; upon questions of law, no presumptions will be indulged in their favor.

2. USURY — SALE OF GOLD.— Where a loan of a certain amount in gold was made, but the borrower executed his note therefor for a considerably larger sum than the equivalent value of the gold in currency, *held*, that the contract was an usurious one, notwithstanding the claim by the lender, that the amount in excess of the value of the gold was not intended for interest, but was simply the rate at which he held the gold.

3. SAME—INTENTION OF PARTIES.—The intention of the parties must be considered in determining whether or not a contract is usurious, and this can be established more safely from the circumstances attending the transaction than from its form or the direct testimony of the parties.

This is an action upon a note of $2,000, dated Sept. 28th, 1874, payable in one year, with interest at the rate of ten per cent., and for the foreclosure of a mortgage executed to secure the same. The answer alleges that the note and mortgage are usurious. The court found that, by mistake, the note was executed for $45 too much, and rendered judgment against the defendant, John S. Walker, for $2,254.69, the amount of said note and interest, deducting said $45; and against the defendants, John S. and R. B. Walker, for $100, attorney's fees, and $750, the cost of keeping the mortgaged premises insured, and foreclosed the mortgage. The defendants appealed. The facts are stated in the opinion.

Stiles & Burton, for the appellants; *A. W. Gaston*, and *Wm. McNutt*, for the appellee.

DAY, Ch. J., delivered the opinion of the court:

I. The following facts are undisputed: On the 28th day of September, 1874, the defendant, John S. Walker, was desirous of negotiating a loan from plaintiff, and on that day he procured from plaintiff $1,700 in gold coin, and executed his note therefor for $2,000, payable in one year, with interest at ten per cent. At that time the premium upon gold was from 9¾ to ten per cent. premium upon the gold, and was to pay 13 per cent. interest for the use of the money; that the ten per cent. premium and 3 per cent. interest were taken out of the sum called for upon the face of the note, and that the agreement was made as a cover for usury.

The plaintiff, upon the other hand, testifies that he told defendant that he had no currency to loan, that he had gold coin deposited in the bank, that he did not wish to sell it at the then current premium, and would not sell it unless he got fifteen per cent., that it was a gold transaction, and the agreement was to pay fifteen per cent. premium upon the gold and ten per cent. interest on the loan, and that he had no intention direct or indirect, to take more than ten per cent. interest upon the note. Plaintiff further testified that he sold the gold for five per cent. above the market value of gold at that time, and that about, or near that time, he sold gold for ten per cent. premium. The court found: "That the consideration for which said note was given, was the sale of two thousand dollars in gold coin, by plaintiff to defendant, at an agreed premium of fifteen per cent. on the same: and that, in the calculation of such premium there was a mistake of forty-five dollars against the defendant," and, upon the issue of usury presented by the pleadings, the court found for the plaintiff. It it is claimed by appellee that these findings stand as the verdict of a jury, and can not be

disturbed, unless clearly unsupported by the evidence. This would be true if the findings were purely findings of fact; but, in this case, a finding that the transaction between the parties was a sale of gold, and not an usurious loan, partakes more of the nature of a legal inference or conclusion than the mere finding of facts, and no presumption in favor of it can be indulged in by this court. What, then, are the facts? The defendant applied to plaintiff for a loan to discharge a mortgage which, it seems, was about to be foreclosed. Defendant obtained in gold coin, $1,700, at the current rate of premium equivalent to not more than $1,870. For this he executed his note secured by mortgage, for $2,000, payable in one year, with interest at the rate of ten per cent. The bald facts appear that the note was executed, bearing the highest legal rate of interest, for $130 more than the sum realized in currency. In Clark v. The City of Des Moines, 19 Iowa, 199, it was held that city warrants, issued by a municipal corporation, in payment of a judgment at the rate of one dollar in warrants for every seventy-five cents due on the judgment, are tainted with usury. In that case it is said: "If I purposely and knowingly give my note for $100, payable on demand, in satisfaction of a debt or judgment of only $75, it is *prima facie*, and perhaps conclusively, usurious." In Arnold v. Potter, 22 Iowa, 194, it is said: "The form of the transaction is nothing; the cardinal inquiry being, when the contract, specifying the amount reserved, is express, did the parties resort to it as the means of disguising the usury in violation of the laws of the state, when the contract was made or to be executed. And in arriving at this intention, all of the facts are to be taken into consideration."

In view of the facts shown by the testimony, the statement of plaintiff that there was no intention to exact more than ten per cent. for the use of the money, is entitled to but little consideration. Intention can not well be established by direct testimony. It is most satisfactorily determined from conduct, relations and actions. And judging the intention in this case from the value of gold, and the relation of the parties, in connection with all the circumstances proved, we have no hesitancy in pronouncing the subterfuge of allowing and exacting five per cent. more for gold than its real market value, a mere cloak for the cover of usury, and that the note is in fact usurious.

II. The mortgage contains an agreement to pay ten per cent. upon the amount of the debt as attorneys' fees, in case it becomes necessary to institute proceedings to foreclose the mortgage. The court allowed $100 as attorney's fees. Appellants claim that plaintiff should have been allowed only the sum of $40 as attorney's fees, because he had an agreement with his attorney to foreclose the mortgage for that amount. The evidence, however, we think, fails to show any absolute agreement with the attorney to foreclose the mortgage for that amount, if it should be contested.

For the error of the court in holding that the note was not usurious, the judgment is reversed, and the cause is remanded, for further proceedings in harmony with this opinion. REVERSED.

THE British Vivisection Act punishes a *savant* for bandaging the leg of a frog in order to illustrate the circulation of the blood, but allows a boy to impale him alive for hours on his fish hook. Mr. Huxley thinks that "this is an anomalous and not wholly creditable state of things."

THE post-graduate prize of $250 for 1877 will be awarded to the writer of the best original thesis, argument or work upon the following subject: "The Legal Relations of Capital and Labor; the Right of the State to Interfere Between Employer and Employed, and what Legislation, if any, should be had on the Subject."

MUNICIPAL TAXATION—TERRITORIAL EXPANSION OF CITIES.

BROWN v. CITY OF DENVER.

Supreme Court of Colorado, April Term, 1877.

HON. HENRY C. THATCHER, Chief Justice.
" EBENEZER T. WELLS, } Associate Justices.
" SAMUEL H. ELBERT, }

1. LEGISLATIVE GRANT OF TAXING POWER.—Every legislative grant of the power to impose municipal taxes or assessments involves a determination by the legislative power that benefits to the tax-payer, proportionate to the burden, will in some way be conferred.

2. PRESUMPTION THAT LEGISLATURE ACTED RIGHTLY.—If a power exists in the courts to review this legislative determination, which has of late been doubted, it is a power to be exercised with great caution. Every presumption is to be made in favor of the legislative action, and whosoever assails it, must affirmatively show that it violates established principles in regard to exemption from taxation.

3. WHAT NOT ESSENTIAL TO GRANT OF THIS POWER.—It is not essential to the validity of such a grant of power that the lands affected should be occupied for residence or trade, or immediately necessary for such occupation, nor that they should be subdivided, or offered for sale in parcels, nor that they should be benefited or enhanced in value in equal ratio with other lands to which the power of taxation is extended.

This was an action of *assumpsit* for money had and received by the plaintiff against the city of Denver, to recover taxes, alleged by plaintiff to have been illegally imposed and assessed upon his land. These lands laid adjacent to the city Denver, but in 1868, the legislature of Colorado passed an act extending the corporate limits of the city over these lands, and after such inclusion of said lands in the corporate lines of the city, municipal taxes were imposed by the city upon them. The facts not being in controversy, the parties submitted the case for the decision of the court, upon an agreed statement of facts, in substance as follows: That the lands specified and assessed and taxed were the property of plaintiff; that said lands are not, and have not been, laid off into blocks, lots, streets or alleys, as a part of the city of Denver, or as an addition thereto, or for any public use or purpose whatever; and that there was and is no desire on the part of the plaintiff to make such use of said lands. That the boundary line of the said city of Denver was extended so as to include said lands by an act of the legislature of Colorado, in the year 1868, at the solicitation of the officers or agents of the city of Denver; that the plaintiff had never mapped or platted said lands (or had it done), as an addition to the city of Denver; that said lands are uncultivated and unimproved, and are lying open to the common; that the act of said legislature in making said lands a part of the city of Denver was without plaintiff's consent or solicitation; that the houses adjacent to said lands are few and scattering; that the southern boundary of said lands forms a part of the southern boundary of said city; that said lands were, and are used by said city only for the purpose of taxation for city purposes, and at present are not necessary except for that purpose; that a tax was assessed and levied by the city of Denver on said lands, for city purposes only, the rate of said tax being according to the valuation of said lands, which was the same rate of taxation imposed upon all other real estate in said city; that plaintiff denied the validity of said tax and refused to pay it, and the tax-collector of said city advertised said lands for sale, as for all delinquent taxes, and was about to sell them for said taxes, to prevent which sale, plaintiff paid said assessed taxes, under protest, and with notice that he reserved the right to contest the validity of the

tax before the courts, by a suit to recover from said city the amount of said tax.

Upon these facts the court below gave judgment for the defendant, the city of Denver, to which judgment the plaintiff excepted, and now assigns said judgment as error.

WELLS, J., delivered the opinion of the court:

Every grant of the power to impose municipal taxes or assessments involves a determination by the legislative power that benefits, proportionate to the burden, will in some way be conferred.

If a power exists in the courts to review this determination, which has of late been doubted (Cooley on Taxation, p. 120), it is a power to be exercised with a cautious hand. Every presumption supports the legislative action, and whoever assails it assumes the burden of proof. Unless a clear violation of the principle which exempts private property from condemnation to public uses, without compensation, be exhibited, the wrong, if any, is beyond judicial interference.

It is not essential to the validity of such a grant of power that the premises affected should be occupied for residence or trade, or immediately necessary for such occupation; nor that they should be subdivided, or offered for sale in parcels suitable for such purposes; nor that they should be benefited or enhanced in value in equal ratio with all other lands to which the power of taxation is extended. The courts will not nicely balance the benefit against the burden, nor limit the liability to the exact measure of the advantage. If, in respect to the particular estate, the proprietor derives a substantial benefit from the maintenance of municipal government, he must contribute to its support. Durant v. Kaufman, 34 Iowa 194; 2 Dillon on Mun. Corp. § 634.

Testing the plaintiff's case by these principles, he has not established his title to the immunity which he asserts. For anything shown by the evidence, these premises may, before the imposition of the tax in question, and before the grant of the power to tax, have been directly connected with the centre of business and population of the city by streets and avenues, opened, graded, paved and lighted, and which are now, and must in the future be maintained at the public expense. These, and the erection of public buildings in the vicinity, the construction of irrigating ditches, and other public improvements, the suppression of nuisances, and the exercise of municipal authority in other respects, may, consistently with all that is shown, confer upon these premises the greater part of their present value; and by the same causes continually operating, that value may be maintained or enhanced in the future. We can not assume that these things are so; neither can we take judicial notice that they are not so. The legislature have found that the proprietor will be compensated for the burden imposed, and it rests upon him, as before said, to negative this conclusion. The facts shown do not maintain the issue which he has made.

The judgment must be affirmed with costs.

CORRESPONDENCE.

CHANGES IN MEANING OF LEGAL PHRASES.

To the Editor of the Central Law Journal:

Our law forms afford a curious example of change in the meaning of phrases which I do not remember to have seen mentioned. The phrase "privily and apart" is a corruption of the old English "privily and apert." "*Apert*" is an obsolete word from the Latin *aperio*, to open, and which meant "openly, publicly." "Privily and apert," meant then "privately and publicly." The phrase is twice used in this sense by Chaucer, in his "Wife of Bath's Tale." At present it seems to be a redundant expression for privately."

X.

THE CHARGES AGAINST JUDGE DILLON.

To the Editor of the Central Law Journal:

As the printed letter of Isaac M. Cate, Esq., addressed to me in reference to the Iowa Central Railroad litigation, has been extensively circulated, and has evidently become the basis for a renewal, although feeble, of the exploded charges against Judge Dillon's judicial character, I deem it proper to give to the public my answer to that letter. It is hereto subjoined.

When I wrote that answer I was not aware that the New York *Nation*, on the 23d ult., had retracted its *retrazit*, published on the 9th ultimo, of its attack on Judge Dillon, of 12th of July last. This renewed assault will be seen, on a comparison of it with Mr. Cate's recent published letters, to be merely a compilation from the latter, which really contained nothing new. The fickleness exhibited by the *Nation* deprives its utterances of all weight in the discussion. In this passing period of corruption and incapacity in the public service, a trenchant discussion of the acts of public functionaries should not be discouraged; but a "zeal without knowledge," prompting groundless insinuations against a man of admitted blameless life, will produce only a recoil, which the really guilty will take advantage of to screen themselves from merited exposure. At any rate, there is nothing in the *Nation's* echo of Mr. Cate's pamphlet to affect the conclusion that the verdict of the bar, the press, and the country, on the insinuations against Judge Dillon, is so decided in his favor that it is perfectly useless for any one to attempt to get a new trial of them.

There is another and conclusive reason why the attempt to injure the standing of Judge Dillon is doomed, and was almost fore-doomed, to ignominious failure. On no occasion has the English love of "fair play" more conspicuously shown itself than in that provision of Magna Charta which secures to an accused a trial "by his peers." The lawyers practising in Judge Dillon's courts are his peers, and when he "puts himself upon the country," as the antique legal phrase runs, on a charge of judicial malpractice, we are first entitled to sit upon the jury of public opinion to try him. A judge exhibits his character not merely by his decisions; he discloses himself to us quite as much by his countenance, gestures and tones, and by his uniform manner of life, as by his formal utterances from the bench. When unsuccessful, we may deny the correctness of his views, appeal from him to a higher court, or even differ from him in his exercise of that "discretion of the court" which plays so important a part in many a case. But let him even but once exhibit prejudice or partiality—not to mention arbitrariness or corruption—and that Argus, the bar, with its hundred eyes, directed by keenest, practiced intellects, will never fail to discover even the slightest divergence from the line of judicial rectitude. In this controversy a firm confidence in the judicial integrity of Judge Dillon has been exhibited not only by the entire bar of his circuit, but also by every one of the lawyers from other states who have been of counsel in the suit specially chosen as the field of battle against him.

Very rarely has a maligned magistrate been so triumphantly sustained by his peers of the legal profession. But, in addition, their verdict has been greeted with overwhelming applause by the audience which awaited it. The press has emphatically justified the maxim that falsehood becomes harmless where truth is left free to combat it. Not one of the journals in his circuit has indorsed, or re-echoed, the insinuations

against Judge Dillon, and their senior, the *St. Louis Republican*, led the way in repudiating them. Even at its own door the *Nation* found more than enough to do in dodging the indignant denunciations of independent journals, exercising upon the enlightened opinion of the general public of the entire Union an influence vastly greater than that which the *Nation* itself has within the eminently respectable, but small, literary and scientific circle to which mainly it addresses itself.

As many persons not familiar with railway-mortgage foreclosure suits have expressed surprise at the unusual hubbub raised about the Iowa Central Railroad litigation, it may be useful to present the following remarks concerning them.

Since the financial crisis of 1873 the United States courts have had the somewhat novel, and certainly vexatious and difficult duty, of settling the affairs of, and even of managing, through receivers, a great many embarrassed railway corporations. Very great and varied interests are involved in the suits in relation to them, and such a suit seems particularly active in arousing the angry passions of those directly or indirectly interested in it—stockholders, bondholders under one or more mortgages of the road, lien creditors, general creditors, employees, etc., etc. Usually two parties arise among them, and it is impossible for the court to please both. One desires a stringent enforcement of a mortgage, and the immediate sale of the railway; the other protests against and endeavors to delay a sacrifice of the property in the depressed financial condition of the country since 1873. Between these contending parties the court usually ordains a truce, by putting the railway "sick man" out to a juridical dry nurse, called a receiver. He should be an entirely impartial and trustworthy person, who, under the guidance of the court, looks to the preservation of the railway property until the litigation concerning it shall have been closed. From a record in the appendix to Mr. Cate's letter to me, it appears that, in Judge Dillon's circuit, eight or ten railways are thus in hospital, and have "all been run with less expense, and have made more money, than when they were operated by the companies."

To add to the difficulties which beset such cases, the law and practice governing them can not be said to be well settled. The courts are called on by one party to confine itself within the narrow bounds of mortgage law; and by the other, to apply the principles of an enlarged equity, in permitting the intervention of those who have interests affected by the suit, but are not necessarily original parties to it—such as individual bondholders or stockholders and creditors. The hardships and possible injustice, or even fraud, which may result from the present condition of the law in such cases, have led no inconsiderable portion of the bar to the opinion that there ought to be a legislative reform, assimilating such suits to proceedings in bankruptcy, or in admiralty, to which "all the world" is a party.

The Iowa Central Railroad case was merely one of the kind above described—and a very common-place one at that. It has attracted special notice because, in the discussions concerning it, two very different questions have been confounded together. One of them, affecting the judicial character of Judge Dillon, is of the greatest interest and importance to the bar of his circuit, and to the six millions of people who reside within it. The other, concerning the details of the Iowa Central Railroad litigation, has not a particle of interest to any one not pecuniarily affected by it, and, to speak frankly, has become somewhat of a bore to the general public, which would never have heard of it, had it not been connected with insinuations against the integrity of a judge who ordinarily presides in the United States Circuit Courts in seven states of the Union. The purity of his character has been so triumphantly vindicated that neither bench, bar nor people now take any interest in the question whether his decisions in that particular case were right or wrong, were sustained or reversed by the United States Supreme Court, or pleased or displeased any particular litigant. A judicial reputation, established by twenty years of service on the bench, can not be affected by any rulings in a case in which all the counsel engaged in it guarantee the honesty of purpose which influenced the court. For myself, as a lawyer, I must say that, having read carefully the last letter of Mr. Cate, and its appendix of records, I think the course of Judge Dillon in the Iowa Central Railroad case was uniformly correct.

The threats of a movement for the impeachment of Judge Dillon have dwindled down to mild intimations of an intention of somebody or other to secure "a searching investigation by *some* competent tribunal." The house of representatives of the United States will not initiate any such farce as an inquiry into the conduct of a judge whose integrity is vouched for by the entire bar of his circuit, and by all the counsel in the case in regard to which the disappointed litigants make complaints. The only probable result, if any, of such a silly movement on the part of the complainants' would be an order to send for persons and papers to show whether any attempt has been made to persecute and intimidate a federal judge by utterly groundless attacks upon his character as a dispenser of justice.

As some members of the bar have questioned my judgment in taking the responsibility of publishing Judge Dillon's letter to me of the 18th of July last, and also the propriety of his writing that letter even to a member of the bar, or noticing in any way the slanders upon him, I have this much to add. It would be simply absurd for a judge to rush into print on every occasion of a criticism upon his judicial action. But the insinuations against Judge Dillon so plainly indicated a concerted effort to break down his entire character, that it was wise to meet and crush them at once. This could not be better done than by himself. The American people never fails to admire the pluck which indicates conscious innocence; and Judge Dillon's own manly, but calm and dignified defiance of his foes has greatly contributed to the almost enthusiasm with which the bar and the impartial press of the country have risen up to sustain him. As the controversy now stands —or rather, as it has now ended—he can afford to answer any revival of the slander, by quoting the rescript of Theodosius the Great, for himself and his colleagues, when urged to punish their vilifiers: "Si quis, modestiæ nescius et pudoris ignarus, improbo petulantique maledicto, nomina nostra crediderit lacessanda, ac temulentia turbulentus obtrectator temporum nostrorum fuerit, eum pœnæ nolumus subjugari, neque durum aliquid nec asperum volumus sustinere: quoniam, si id ex levitate processerit, contemnendum est; si ex insania, miseratione dignissimum; *si ab injuria, remittendum.* Unde, integris omnibus, ad nostram *conscientiam* reservetur, ut ex personis hominum dicta pensemus, et utrum prætermitti an exquiri debeant censemus."

I remain, Mr. Editor, very respectfully yours,

THOS. C. REYNOLDS.

ST. LOUIS, Mo., Sept. 1, 1877.

NOTE BY THE EDITOR.—This magnanamous response of Theodosius the Great, for himself and his colleagues in power, to his over-zealous prime minister, was made A. D. 393; and as some of our readers may have become rusty in their Latin, we append a free, but accurate translation:

"If any one, ignorant of modesty and incapable of shame, should believe that he has injured our reputations by some

dishonest and petu'ant malediction and has become, in his insolence, a turbulent maligner of our conduct, we are unwilling that he should suffer any punishment, and we desire that he should meet with no hardship or rudeness; for, if his act arose from levity, it is to be contemned; if from an unsound mind, it is most worthy of pity; *and if from malice, we forgive him.* Therefore, no steps shall be taken, and such matters shall be referred to our own conscience, so that, regarding the persons of all implicated, we may think of what they have said, and decide whether to pass them by, or examine into them."

LETTER OF GOV. REYNOLDS TO MR. CATE.

ISAAC M. CATE, ESQ., Boston, Mass.:

SIR: I have received from you a printed letter, addressed to me, in relation to the Iowa Central Railroad litigation. I take little interest in the discussion of it, beyond that which the bar in general of Judge Dillon's circuit has, in the purity of its judiciary; and I am too well aware of the soreness nearly always felt by a dissatisfied litigant, to be prejudiced against you on account of your former pamphlet, which seems to have given rise to those "insinuations," as the New York *Nation* termed them, against that distinguished jurist, which had attracted attention chiefly because of their having been noticed by that influential periodical. But as your letter seems to call for some answer from me, I have carefully perused it, with a sincere desire to weigh it impartially; and I feel bound to say, merely, that the statements and documents it contains have only confirmed my cordial assent to the opinion expressed by the St. Louis *Republican*, on publishing Judge Dillon's letter of the 18th ult., that it is "a complete and overwhelming vindication" of his course in the Iowa Central Railroad litigation.

But any further discussion on the subject is wholly superfluous. The New York *Nation* itself has candidly stated that Judge Dillon's letter has explained his course "in a manner which, to a layman, certainly seems entirely satisfactory." To lawyers it has unquestionably been so; "counsel for all the parties in the Central Railroad of Iowa foreclosure case" promptly united in a public declaration, in reference to Judge Dillon, affirming their "utmost confidence in him as a judge, that all his decisions in the case referred to, have been made with perfect honesty and purity of motives, and that nothing therein can be found which ought in the least to reflect upon his judicial integrity." Language could not be stronger. The whole matter has been thoroughly discussed in the press and the result is thus accurately stated by the New York *World*, of the 3d inst.:

"Indeed, it may be said that the assault has been, for Judge Dillon, rather a subject of rejoicing, since it has called forth such a universal expression of confidence in him, not only from his intimate personal friends and from the bar of his own circuit, but from the impartial public in all parts of the country; and these testimonials are rendered more valuable in many instances by the fact that they come spontaneously from political opponents."

The verdict of the bar, the press and the country, on the insinuations against Judge Dillon, is so decided, that it is perfectly useless for any one to attempt to get a new trial of them; permit me to express the hope that, for your own sake, you also, on calm reflection, will concur in it.

Yours very respectfully, THOS. C. REYNOLDS.
ST. LOUIS, Mo., August 27, 1877.

AFTER an attack upon Judge Dillon, which elicited very harp censure from respectable papers in all parts of the country, *The Nation* lends itself again to the uses of the clique whose schemes of plunder his just conduct thwarted. It is a pity. No enemy could ever have placed that paper where it has placed itself by this performance.—[The (N. Y.) *Public*, (Aug. 30.)

NOTES OF RECENT DECISIONS.

MARSHAL'S BOND—STATUTE OF LIMITATIONS.—*U. S. v. Rand*, 14 Pac. L. R., 257. U. S. Circuit Court, California. SAWYER, J. Section 784 of the Revised Statutes, limiting the time within which actions must be commenced on marshals' bonds, does not apply to actions instituted by the United States.

HABEAS CORPUS.—Although a jury in a capital case may have been erroneously discharged on failing to agree, yet this will not entitle the prisoner to be enlarged by *habeas corpus*. The prisoner must apply for relief to the court where the indictment is pending. Following Wright v. The State, 5 Ind. 290. *State ex rel. Noonan v Sheriff*, 1 N. W. Reporter, 132.

PRINICIPAL AND AGENT—AUTHORITY OF A GENERAL AGENT OF A RAILROAD COMPANY.—1. The general agent of a railroad company is authorized by virtue of his position as such general manager of the company's affairs, to employ a hotel-keeper to furnish board and attendance, at the expense of the company, to a brakeman injured while working for such company; and *held*, that a station agent of a railroad company, by virtue of his position as such agent, has not the like authority. Opinion by HORTON, C J. All the justices concurring. Affirmed.—*A. & P. R. R. Co. v. Reisner.*

CASE MADE—PRACTICE—1. Where the court below, after a case is disposed of in that court, gives three days to make a case for the supreme court, and the case is served on the opposite party the day such order is allowed, and on the same day the case is presented to the judge for settlement, and is on that day and on the very day on which it is served, settled, certified, signed, attested, sealed and filed with the papers in the case, without notice to or suggestion of amendments, or appearance by the opposite party. *Held*, that the pretended case made was erroneously settled and signed, and the petition in error founded thereon, presents no case for any review of the proceedings of the court below by the supreme court. Opinion by HORTON, C. J. All the justices concurring. Dismissed.—*Weeks v. Medler.*

BOND OF OFFICER WHO IS HIS OWN SUCCESSOR—PRESUMPTION.—*U. S. v. Earhart*, 14 Pac. L. R., 257, U. S. Circuit Court, District of Oregon. DEADY, J. H. was appointed superintendent of Indian affairs to succeed himself, and at the date of the execution of his second bond there was a balance due the United States of the moneys received by him under his first bond: *Held*, that there could be no presumption that this sum had been illegally appropriated by the officer, but the fact must be proved by the party claiming or alleging it; and that in the absence of such proof, the presumption is that this balance was then in the hands of the officer, to be applied and accounted for under his second bond. Following Bruce v. U. S., 17 How. U. S. 437.

QUO WARRANTO—NATURALIZATION — AMENDMENT OF NATURALIZATION PROCEEDING BY COURT, NUNC PRO TUNC—RECORD OF NATURALIZATION IMPORTS ABSOLUTE VERITY—When an application to be admitted a citizen of the United States is made under that provision of the naturalization law, found in section 2167 U. S. Rev. Stat., it is not necessary to have made or to make the declaration required in the first condition of section 2165. The provision of 2167 requiring the applicant to make the declaration required in section 2165, at the time of his admission, has reference to the declaration required to be made at the time of the admission—*i. e.*, the declaration required by the second

condition of § 2165. It is competent for a district court of the sate to amend *nunc pro tunc* the record of naturalization proceedings had therein, so as to correct an error of the clerk and make the record conform to the truth. The record upon which the defendant relies in this case in proof of his citizenship is a genuine record of a district court of this state in due form, of what purports to be regular proceedings in naturalization in that court resulting in a judgment, which admits the defendant to become a citizen of the United States. It is the record of the proceedings of a domestic court of general jurisdiction, and as the court had, under the laws of the United States, jurisdiction of the subject-matter of the proceedings, and as it affirmatively appears upon the face of the record that the court had jurisdiction of the person of the defendant, the record imports absolute verity, and therefore it can not be impugned, nor the judgment contained in it questioned in a collateral proceeding. *State ex rel. Brown v. McDonald*, 1 N. W. Reporter, 133. Supreme Court of Michigan.

INSURANCE—WAIVER OF CONDITIONS OF POLICY—CONDITION THAT WAIVER MUST BE ENDORSED ON THE POLICY—EFFECT OF PAROL WAIVER—PRINCIPAL AND AGENT—AGENT'S KNOWLEDGE—HOW FAR PRINCIPAL AFFECTED.—1. A condition contained in an insurance policy, that no officer could waive the performance of a condition except by endorsement on the policy, will not prevent a general officer of the company from waiving a condition by parol, and the question is one of fact for the jury. 2. By the terms of an insurance policy "no agent or other persons, excepting one of the general officers of the company (and then only by endorsement hereon, made and signed by said officer), as authorized to waive, change, alter, or amend any condition or provision of this policy." The secretary having requested the plaintiff's adjuster to delay making out proofs of loss, pending estimates for rebuilding, thereby leading the insured to believe that proofs of loss would not be required within the time specified in the conditions: *Held*, that it was a question of fact for the jury, whether there was a waiver or not. 3. The terms of a policy stipulated that "if any incumbrance exists on the insured property at the date of this policy * * * and the insured shall fail to notify the secretary of this company thereof in writing * * * this company shall not be liable for loss or damage under this policy." An undisclosed mortgage existed at the time of issuing the policy; subsequently, through the same agents, the mortgagee's interest was insured under another policy, and eight months after renewal certificate of the first policy was issued. Both policies were signed by the president and secretary of the company, and countersigned by the agents: *Held*, that the above facts, if not conclusive, were yet sufficient to warrant the jury in finding that the defendant had knowledge of the incumbrance. Opinion by GORDON, J.—*State Ins. Co. of Mo. v. Todd*, 4 Weekly Notes, 245. Supreme Court of Pennsylvania.

LANDLORD'S LIEN—MORTGAGE.—1. The landlord's lien for rent is postponed to a mortgage or deed of trust existing upon the furniture of the tenant, before it is moved upon the premises; but where that is displaced, his lien is good against all subsequent incumbrances. 2. Where a note secured by a chattel mortgage is destroyed, and a new note given in its stead secured by a new deed upon the property to a different trustee, the lien of the new deed, if it is duly accepted and recorded, takes effect as to third persons from its date only, and these facts operate to let in the landlord's lien for rent in arrears. "There is no dispute about the right of a landlord to a lien upon his tenant's chattels unincumbered at the time when placed on the premises, or which, being incumbered at that time, may become free from incumberance during the tenancy. The furniture was subject to deed of trust when they were moved upon the premises, and the main question is as to the effect of the second deed upon the landlord's lien. It is true, that a new note given for a former one will not extinguish the indebtedness, unless it is received in payment, and if the transaction here were simply the renewal of the note, it would still be a charge under the deed upon the furniture. But this is not the view in which the exceptions are presented, for the jury were instructed that if they found from the evidence, that the note secured by the first deed of trust was destroyed and a new note given therefor, secured by a new deed upon the furniture, to a different trustee substituted for the first one, the lien of the new deed of trust, if duly accepted and recorded, took effect from its date only, and that this state of facts would operate to postpone the lien of the *cestui que trust*, and to let in the landlord's lien for rent. The case is not, therefore, that of a note given in renewal for the amount due upon a former one which was secured by a mortgage, but is the case of a new note secured by an entirely different instrument, vesting the title in another party. Whether the original debt was extinguished as between grantor and the *cestui que trust*, or whether there was an understanding between them that the new mortgage should stand as security for it, can not affect the rights of the landlord. His lien was undoubtedly postponed to the original security, but when that was removed his lien was good against all subsequent incumbrances. The action is brought by the new trustee, who certainly can claim no priority except from the date of the deed under which he became a trustee. See Act of Congress, February 22, 1867; Webb v. Sharp, 13 Wal. 15." Opinion by MAC ARTHUR, J.—*Hichtman v. Sharp*, 4 Wash. L. R. 257.

VOLUNTARY ASSIGNMENT — SET-OFF.—Defendant had a running account of deposits with the City Bank; the bank discounted his note; subsequently and before the maturity of the note the bank made an assignment. At the time of the assignment defendant's deposit exceeded the amount of his note. The assignee sued defendant on his note when it became due. *Held*, that defendant was entitled to be credited with his deposit as a payment of the note. The following is the opinion of the court: "In *Re* Fulton's Estate, 1 P. F. Smith 211, it is said: 'Perhaps nothing is better settled in this state by uniform and numerous decisions, than this, that a voluntary assignee is the mere representative of the debtor, enjoying his rights only, and no others, and is bound where he would be bound; that he is not the representative of the creditors, and is not clothed with their powers; that he is but a volunteer, and not a *bona fide* purchaser for value.' Many cases are cited for these propositions. See Wright v. Wigton, Mercur, J., 34 Leg. Int. 281, August 10, 1877. Martin Sherlock made his note of $350, June 13, 1876, at ninety days, which the City Bank discounted and held on and before the maturity of the note. He had a running account of deposits in the bank before and during the running of the note, in which there was a balance due him September 6, 1876, of $395.50, the bank then being the holder of the note. The bank made a voluntary assignment for the benefit of creditors on the 7th of September, 1876. When the note passed by this assignment to the assignees, Sherlock was the creditor of the bank, and had an immediate right of action against it. The assignees being the mere representatives of the bank, and not purchasers for value, took the note subject to his right of set-off. It is clear, according to the authorities, that the bank

conferred upon the voluntary assignees no right greater than their own, which was a right of action when the note fell due, subject to the existing set-off. Bosler v. The Exchange Bank, 4 Barr, 32, and its sequents, were decided on a widely different principle. When Bosler died the bank had no debt due for which it could sue, while Bosler's right of action was perfect before his death. But, at the moment of his death, the law took possession of his estate for the benefit of his creditors, he being insolvent. It was not the case of a mere voluntary transfer, but new rights sprang into being at the instant of his death. At his death the debts did not *ipso facto* annul each other, for the reason that the bank had no immediate right of action. Consequently, when the estate, by operation of law, passed into legal administration, and was *in questio legis*, the rights of creditors immediately attached, and the estate being insolvent, equity demanded equality among the creditors of the same class. Hence the right of the bank as a creditor was to a *pro rata* only. But a voluntary assignment has no such effect. It does not alter the status of the rights of the creditors, as death does the decedent's estate. It is true, the duties and obligations of the assignees are regulated by law, but the transmission of the estate to them is the merely voluntary act of the debtor, who can not impair the rights of creditors which had attached before his act. We discover no error in the record and the judgment is affirmed. Opinion by AGNEW, C. J.—*Jordan v. Sherlock*, 34 Leg. Int. 288. Supreme Court, Penn.

ASSIGNMENT OF UNEARNED WAGES—ASSIGNMENT OF FUTURE CONTINGENCY.—*Kane v. Clough*, Supreme Court, Michigan. Opinion by COOLEY, J. 16 Am. L. Reg., N. S. 482. A mere possibility, such as the earning of wages from a future employment, for which there is no existing contract, is not assignable. But where there is an existing contract for employment, the possibility is coupled with an interest, and is therefore a vested right which may be assigned. Where the employment is to do piece-work, without any definite contract for its continuance, but under the expectation, on the part of employer and employee, that it will be continuous, an assignment of wages to be earned is valid, and the assignee will take precedence of an attaching creditor of the assignor. Extract from the opinion: "It has often been decided that a mere possibility is not the subject of assignment; a contingent claim against a foreign country, to damages to be recovered by treaty, is an illustration. Vasse v. Comegys, 4 Wash. C. C. 570. A sale of fish thereafter to be caught, passes no title when they are caught. Low v. Pew, 108 Mass. 347. The same is held of a sale of sums to be earned by a physician in specified future years. Skipper v. Stokes, 42 Ala. 255; and see Purcell v. Masher, 35 Ala. 570. In Massachusetts an assignment of future services, there being no existing contract of service, has been held invalid; but cases are cited in the same state which hold that if the assignor is at the time under a contract of service, it is maintainable. Mulhall v. Quin, 1 Gray, 105; see also Hartley v. Tapley, 2 Gray, 565. An officer may assign his salary, though removable at any time. Brackett v. Blake, 7 Metc. 335. In Pennsylvania an assignment which professes to transfer a debt to arise for wages not yet earned, against any one by whom the assignor may thereafter be employed, is held to be ineffectual even after the wages are earned. Jermyn v. Moffit, 75 Penn. St. 399. In New Hampshire it is decided that wages to become due may be effectually assigned, provided there is at the time an existing contract under which they are to be earned. Gareaud v. Harrington, 51 N. H. 409. The like conclusion is reached in Connecticut. Hawley v. Bristol, 39 Conn. 26; Augur v. New York, etc., Co., 39 Conn. 536. The distinction between the cases in which the wages are not earned under a contract existing at the time of the assignment, and those in which they are, is said to be that "in the former the future earnings are a mere possibility coupled with no interest, while in the latter the possibility of future earnings is coupled with an interest, and the right to them, though contingent and liable to be defeated, is a vested right:" Low v. Pew, 108 Mass. 347, 350. But an assignment of demands having no actual existence, though invalid at law, may be valid in equity as an agreement, and take effect as an assignment when the demands intended are subsequently brought into existence: Old v. New York, 6 New York, 179; Mitchell v. Winslow, 2 Story C. C. 630, 638. And in this case the assignee would have had a plain right, we think, to protect her interest under the assignment to the extent to which the wages were earned, if the sum had been sufficient to give the court of chancery jurisdiction. And it is worthy of consideration whether, under the garnishee laws, it was the intention to permit the creditor to reach demands to which the debtor had no equitable right, even though his legal title had not been parted with, or to force the equitable owner into a suit in equity for the protection of his rights.

ASSIGNMENT FOR BENEFIT OF CREDITORS—TAXATION.—*Wright v. Wigton*, 34 Leg. Int. 281. In Pennsylvania, a voluntary assignment for the benefit of creditors, whether of realty or personalty, neither relieves the property from payment of taxes already assessed against it, nor exempts it from future taxation in the hands of the assignee. Extract from the opinion of the court by MERCUR, J. "It is well settled in this state, by numerous decisions, that a voluntary assignee is not a *bona fide* purchaser for value. He is the mere representative of the debtor, enjoying his rights only, and is bound where he would be bound. Twelves v. Williams, 3 Whart. 485; Vandyke v. Christ, 7 W. & S. 373; Ludwig v. Highly, 5 Barr, 132; *In re* Fulton's Estate, 1 P. F. Smith, 204; Spackman v. Ott, 15 Id. 131. Nor are the creditors, for whom he holds the property in trust, purchasers for value. They are not parties to the deed. They have relinquished nothing in compensation of the benefits of the trust. They have not agreed to look to it for satisfaction of their claim. They have no title to the property assigned. They acquired a right only to enforce the duty undertaken by the assignee. Twelves v. Williams, *supra;* Jeffries' Appeal, 9 Casey, 39; Fulton's Estate, *supra;* Spackman v. Ott, *supra*. The assignee, then, being the hand only of the assignor, and through which the latter distributes his property, it follows that it remains liable to taxation, as if no assignment had been made. It is no more exempt from taxation than lands devised to an executor to sell for the payment of debts. In either case the lands continue subject to taxation. The remaining question is, whether the personal property was legally liable to distress for the non-payment of taxes. The borough taxes were for the years 1874 and 1875. The county tax for 1875, and the school tax for 1875-6. The assignment of both real and personal estate was made 31st of December, 1874. The distress was made 18th of December, 1875, on the personal property assigned, which still remained on the premises thus taxed. It is undoubtedly true that the warrant of a collector of taxes is no lien on property before actual seizure. It was also held in Smith v. County of York, 18 P. F. Smith, 439, that, under the act of 15th of April, 1834, the goods and chattels of a person occupying real estate were not liable to distress and sale for the non-payment of taxes assessed thereon, in like manner as

if they were the goods and chattels of the owner of such real estate, unless they were assessed during his possession or occupancy thereof. But, as we have shown, the assignment was not a *bona fide* sale of the property for a valuable consideration. The title thereto remained in the assignor for all purposes not inconsistent with the trust. Neither the assignee nor the creditors can successfully claim that the property shall be exempt from the public burden. This view of the case is further supported by the act of 16th of March, 1866, P. L. 226. Section 1 declares that, from and after the passage of this act the goods and chattels of any owner or occupier of any messuage or lot or piece of ground within said county of Montgomery, shall be liable to be distrained for the taxes of the then current year assessed on said premises before such owner took possession or became owner thereof. Section 2 authorized the goods and chattels to be distrained anywhere within the county, although the same are not on the premises. The act of 17th March, 1868, P. L. 342, relating to the collection of taxes in the same county, does not repeal these provisions in the act of 1866. It leaves the liability of property for taxation, and the property subject to distress for the non-payment of taxes, untouched. The tax for 1874 was laid and due before the assignment. The personal property was liable to distress at the time the assignment was made. No such change of possession took place as to remove that liability. The School Directors of the City of Lancaster v. Rathvon, 6 Casey, 533, has been cited as sustaining a different view. An examination of that case shows it to be wholly unlike the case now under consideration. There, all the taxes assessed on the real estate had been paid. No question was raised as to the liability of the assignee to pay those taxes, nor of the liability of the personal property thereon to distress for their non-payment. The only question was, whether the "bills receivable" were liable to assessment and taxation in the hands of the assignee. The court held they were not. Nothing in that case, in the slightest degree, impinges on the doctrine that the personal property on the land is liable for the taxes assessed on the same land. It follows, therefore, the learned judge erred in entering judgment in favor of the defendant, and it must be reversed."

LIEN OF JUDGMENT AT COMMON LAW AND BY STATUTE—EFFECT OF JUDGMENT DOCKET.—The entry of a judgment upon a judgment docket, which does not set out the amount of the judgment and costs otherwise than in figures, without any signs to indicate dollars and cents, is not operative to give a lien upon the debtor's real estate.—Extract from the opinion: "At common law, a judgment for a debt or damages could only be enforced against the goods and chattels and the present profits of the lands of the debtor. But the possession of the lands could not be reached. Afterwards, the statutes of Westminster 2, 13 Ed. I., c. 18, (2 Inst. 394), gave the creditor the option to take a moiety of the debtor's land upon an *elegit*, to hold until the rents and profits would satisfy the judgment; and thereupon it was said that the judgment was a lien upon such lands. (3 Black. Com. 418; U. S. v. Morrison, 4 Pet. 135; Bank of U. S. v. Winston's Executors, 2 Brock. 253; Massingill v. Downs, 7 How. 765; Shrew v. Jones, 2 McLean, 79.) But this lien only conferred a right to levy upon the land within a year and a day from the rendition of the judgment, to the exclusion of adverse interests therein, acquired subsequently to such judgment; yet when such levy was actually made, it related back to the date of the judgment, so as to exclude all intermediate incumbrances. But, subject to this, the judgment-debtor had full power to dispose of his property, notwithstanding the judgment. The judgment-creditor acquired no *jus in re*, but only a mere power to make his general lien or privilege specific and effectual by an execution and levy upon the property of his debtor. (Conrad v. the Atlantic Ins. Co., 1 Pet. 443.) Now, the modern statute lien of a judgment, as provided in sections 269–7–8 of the Oregon Civil Code, is altogether different from this. In the latter case, the lien arises, not from the judgment, but the docket thereof. Without the entry in the docket, there is no lien. Neither is this statute lien contingent upon the issuing of an execution and a levy. It is absolute—even against a conveyance of the same premises by the judgment-debtor. Being a creature of the statute, and not an incident or consequence of the judgment, its existence and validity depend upon a docket-entry, in conformity with the statute. It is a strict legal right or advantage, and must stand or fall by the statute which gives it. Miami Ex. Co. v. Turpin, 3 Ohio, 514; Douglas v. Huston, 6 Ohio, 162; Buchan v. Summer, 2 Barb. Ch. 165; Isaac v. Swift, 10 Cal. 81; Ackley v. Chamberlain, 16 Cal. 183; Bowman v. Norton, Id. 221. True, there must be a valid judgment behind the docket, or it will be of no avail. But, nevertheless, the docket is no part of the judgment or action in which it was given. The docket may be made in every county in the State, and a lien thereby created upon all the lands of the judgment-debtor therein. The judicial proceeding which commences with the filing of the complaint, ends with the entry of judgment therein. The docketing of the same is something apart and collateral. It is the ministerial act of the clerk, and may, if the law should so provide, be as well done in the office of a recorder, or other place where a record of deeds and other transactions affecting real property is made and preserved, as in the clerk's office. Therefore, a defective, ambiguous or insufficient docket can not be aided by a reference to the judgment, or other proceedings in the action. To create the lien, the docket must be complete in itself—must impart all the information which the statute contemplates, without reference to any proceeding which has gone before. Neither is it a mere index, or notice to look elsewhere. But it is an independent record of particular facts, authorized for the special purpose of creating and fastening a lien upon the real property of the judgment-debtor against all parties subsequent in interest; and therefore must be complete in itself, or it is without effect. Nor is the entry in the docket intended to be a mere notice of an existing and antecedent fact—the judgment. True, the entry must contain certain facts, which presupposes a corresponding judgment. But the direct and ultimate purpose of the entry is not to give notice of the judgment, but to produce a certain legal effect, to wit: a lien upon the real property of the judgment-debtor within the county. Therefore, the authorities cited by the counsel for the creditor—Fowler v. Doyle, 16 Iowa, 534; Delavan v. Pratt, 19 Iowa, 431; Markham v. Buckingham, 21 Iowa, 496, and Carr v. Anderson, 24 Miss. 188—which hold that when the judgment-entry is obscure or imperfect, it may be read in the light of the pleadings and prior proceedings in the case—are not in point. Besides, these cases trench upon, if they do not belong to the class which are said to 'make bad precedents,' and to be 'the quicksands of the law.'

"Conceding, then, that this docket-entry must stand or fall by itself, it is insufficient upon both reason and authority. The *amount* of the judgment—the thing, number or value of that which the plaintiff is thereby shown to be entitled to recover off or from the defendant therein—does not appear. This is one of the essentials of the entry. The figures under the head,

'Amount of Judgment,'—14 80 and 1875 00—do not indicate anything but abstract numbers. As was well said by Mr. Justice Sawyer upon a similar question, in People v. S. F. Savings Union, 31 Cal. 136: 'They are simply numerals—barren figures—that are as often employed to indicate anything else that may be numbered as dollars; or if money is indicated the denominations may be either eagles, dollars, cents or mills.' To the same effect is the ruling in Hurlbut v. Butenop, 27 Cal. 56; Tilton v. O. C. M. R. Co., 3 Saw. 24; Lawrence v. Fast, 20 Ill. 341, and Lane v. Bommelman, 21 Ill. 147. In the last two cases, it was held that a judgment for taxes upon an assessment which, in the valuation column, contained only abstract numbers, without any mark or word to indicate whether they were intended for dollars, cents or mills, was void for uncertainty. The ruling in these cases was followed by the Supreme Court of the United States in Woods v. Freeman, 1 Wall. 399—a case, it is true, from Illinois—but without a doubt or suggestion as to its correctness. In Buchan v. Sumner, *supra*, it was held as to the docket of a judgment in which the Christian name of the judgment-debtor was used for the surname, and *vice versa*, that the entry was therefore void and of no effect." *Re Beyd*, 14 Pacific Law Reporter, 254. U. S. District Court, Oregon, DEADY, J. S. C. 9 Chicog. Leg. News, 385.

ABSTRACT OF DECISIONS OF SUPREME COURT OF TEXAS.

June Term, 1877.

VERDICT—JUDGMENT.—In trespass to try title, the defendant pleaded in reconvention, and asked for an affirmative judgment on his own title, and to remove cloud from his title. The court instructed the jury that, if they should find in favor of defendant on his plea of reconvention, their verdict in substance, should be, "we, the jury, find for the defendant the land in controversy, on the plea of reconvention;" but if they failed to find for the defendant on that plea, the plaintiff having abandoned his suit, they would say, 'we, the jury, find for the defendant." The jury returned the following verdict: "We, the jury, find for the defendants against the plaintiffs." On this verdict a judment was rendered, that the title to the land was vested in defendant, and removing the cloud caused by plaintiff's claim. *Held*. 1. Though the verdict was not in the phraseology prescribed by the court, it must be regarded as a general verdict for the defendant, and not as responsive to the issue on the plea of reconvention. 2. That in view of the charge of the court, the verdict did not warrant the judgment, though it would have been sufficient to authorize it, had the special instructions as to the form in which it should be returned not been given.

DEED—CONVEYANCE—CHAMPERTY—E. Executed a written instrument to C. & C., in which he declared that he did thereby "sell, transfer, convey and assign" to C. & C. a tract of land (describing it) for one hundred dollars then paid, and in which it was recited that C. & C. had bound themselves to pay the further sum of eight hundred dollars, provided C. & C. should "gain said land" from parties in possession, to be paid on the day they should gain it by suit or compromise. It further stipulated that the deferred payment should constitute a lien on the land, the one hundred dollars paid to be lost if C. & C. failed to get the land, and the instrument to be "null and void" if they failed to gain it. The instrument concluded with a warranty of title from E. to C. & C. On the question whether the instrument was admissible in evidence as a deed in trespass to try title, *held:* 1. The instrument was not liable to the objection that it failed to vest in C. & C. such legal or equitable title as E. could convey; whether technically a deed or not, the evident purpose is clear, from the instrument, to convey E.'s interest in the land unconditionally. 2. It can not be maintained, without running counter to former decisions of this court, that the transaction was champertous. 3. Although at common law no interest could be conveyed by deed, unless the grantor was in actual or constructive possession, still it is an admitted principle in this state, that the adverse possession of land in no way hinders or precludes its sale and conveyance by the owner, though he may have been ousted from the possession. 4. The fact that parties to a conveyance agree to substitute, in place of a general warranty of title, a special covenant for a deduction of the amount to be paid for the land by the vendee, in case he should be unable to get possession of it, either by compromise or suit, will not avoid the title, or show, of itself, that the contract is void for champerty. Opinion by MOORE, J.—*Campbell v. Everts.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

July Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

CONDITIONAL SALE.—1. S. & H. owning ties along the line of the St. Joe & Denver City Railroad Company, made a contract with said company by which the latter were authorized to take as many of said ties as it needed for the repair of its track, and in which it was stipulated that the ties were to be counted and accounted for after they were placed under the track, and that the title should not pass to the company until after they were under the rail. *Held*, that such stipulation, as to the time of passing the title, was valid, and that no creditor of the company, having notice of such contract, could, prior to such time, acquire any title to such ties as against S. & H. by a levy and sale on an execution against such company, although the employees of the company had taken possession of the ties and moved them to different places along the line of the road. Opinion by BREWER, J.; all the justices concurring. Affirmed. *Owens vs. Saxton.*

PRACTICE IN THE SUPREME COURT—EXTREME CRUELTY.—1. Where an action has been tried by a court without the intervention of a jury, and the court makes special findings, the findings of the court are as conclusive in the supreme court as the verdict of a jury, and where each finding of fact is sustained by some evidence, this court will not order the findings set aside, nor grant a new trial, although the evidence offered is of the most unsatisfactory character, and thereon this court, if sitting as a *nisi prius* court, might return different conclusions of fact. 2. When the conduct of the husband is such that the life or health of the wife may be endangered by his acts towards her, and upon the evidence in the case the district court has granted a decree of divorce, *held*, that the supreme court will not, upon review of the proceedings, reverse such judgment, because the evidence is contradictory and conflicting. Opinion by HORTON, C. J.; all the justices concurring. Affirmed. *Gibbs v. Gibbs.*

PLEADING—PARTITION AND EJECTMENT—ACTIONS MAY BE JOINED.—1. The following causes of action may be united in the same action, to-wit: 1. A cause of action for the recovery of real property. 2. A cause of action for the value of the rents and profits of such

real property. 3. And a cause of action for the partition of said real property. II. The meaning of the following words discussed, to-wit: "cause of action," "arises out of," "transactions," "connected with," "subject of action," "subject matter of the action," and "object of the action." III. Where said above-mentioned causes of action are all united in one petition, it is not necessary that the plaintiff should allege in his petition that he is in the possession of said real property, in order to maintain his cause of action for partition. On the contrary, he may allege that he is not in possession, and that the property is held adversely to him by the defendant, provided that he also alleges that he is entitled to the immediate possession of the property. Opinion by VALENTINE, J.; BREWER, J. concurring. Affirmed. *Scarborough v. Smith.*

SUPREME COURT WILL NOT REVIEW CONFLICTING EVIDENCE.—1. Where the findings and verdict of a jury have been rendered upon oral and written testimony, and the evidence taken orally is conflicting, but there is clear, positive and unequivocal testimony sustaining the findings and verdict, and the district court has approved the same by refusing to set them aside and grant a new trial, the supreme court will not reverse the judgment of the district court and order a new trial, where the only ground therefor is that the findings and the verdict are against the evidence. K. P. R'y. v. Kunkle, 17 Kas. 145, and the authorities there cited. Opinion by HORTON, C. J.; all the justices concurring. Affirmed. *George v. Myers.*

CONSTRUCTION OF STATUTE REQUIRING RAILROAD COMPANIES TO FENCE.—1. The purpose and scope of the law of 1874 (laws 1874, p. 143), requiring all railroad companies, whose roads are unfenced, to pay for injuries done to stock by their engines and cars, was to obviate the necessity of inquiring into the *mere negligence* of the owners of the stock, or of the parties in charge of the trains; and where cattle get upon the track at a place where the road can and ought to be fenced, and, without any wanton or wilful act of the owners or persons in charge, are there injured by a passing train, the law applies, and the company is responsible for the injury. Opinion by BREWER, J.; all the justices concurring. Reversed. *Hopkins v. K. P. R'y Co.*

AGREED STATEMENT OF FACTS NO PART OF A RECORD—PRACTICE.—1. Where the journal entry of a case shows that the action was tried upon an agreed statement of facts, and the transcript purports to contain a statement of facts signed only by the attorneys of the parties to the suit, but such statement of facts is not contained in the journal entry of the judgment, nor otherwise identified as the facts upon which the case was tried, and the agreed statement of facts is not preserved in any bill of exceptions, or case made, and there are no findings of fact separately made, and no motion for a new trial, and no error is apparent in the record, *held*, that there is no case here for the consideration of alleged errors, and the supreme court must necessarily affirm the judgment of the district court. Opinion by HORTON, C. J. All the justices concurring. Affirmed.—*Patee v. Parkinson.*

PARTIES—A DE FACTO SCHOOL DISTRICT.—1. Where an action is commenced against the county treasurer and sheriff to enjoin a school district tax, it is not error for the court to allow the school district afterwards to be made a party defendant. 2. Where an attempt was made in 1871 to organize a certain school district, and such district afterwards became a school district *de facto*, being recognized as a valid organization, not only by the people of the district, but also by the county superintendent of public instruction, and by other county officers, and by the people generally, and has elected officers, received public school money, built a school house, and maintained schools up to the commencement of this action in 1875. *Held*, that the question whether the original organization of the district was legal and valid, can not be inquired into, in an action to enjoin a tax levied in 1874. Opinion by VALENTINE, J. All the justices concurring. Affirmed.—*Voss v. Majros.*

GIFT—COSTS.—1. N. being solvent gave a watch to H., a little girl, and placed it in her possession, requesting her to wear it in remembrance of him. Some months thereafter, her father persuaded her to let N. take the watch and keep it for her until she was old enough to take care of and wear it. While thus holding the watch N. made no claim to it as his, spoke of it to the party who afterward became his administrator as the watch of H., and in his last sickness directed that it be delivered to her. Nearly two years after the gift N. died insolvent, the watch still being in his possession. His administrator took possession of the watch as property of the estate. Demand having been duly made H. brought replevin for it. The administrator answered disclaiming any personal rights in the matter, but alleging that he held it as the property of the estate. *Held*, that a judgment in favor of H. for the possession of the watch and against the administrator for the costs was correct, and that, whether the administrator could thereafter recover these costs from the estate depended upon the *bona fides* of the defense. Opinion by BREWER, J. All the justices concurring. Affirmed.—*Whitford v. Horn.*

MISTAKE OF FACT—ILLEGAL TAXES RCOVERABLE—STATUTE OF LIMITATIONS.—1. Whether the title to government land has so passed from the government that the land has become taxable, may be a question of fact, and not merely a question of law; and whether title has or has not so passed, may be alleged in a pleading, as a fact. 2. Where land has been taxed for several years, and was sold to the county for the taxes of the first year, and the other taxes were charged up against the land, and Y afterwards purchased from the county the tax-sale certificate, and afterwards the county clerk discovers that the land belongs, all the time, to the United States, and was therefor not taxable, and refuses to convey said land to Y for said taxes; and the county treasurer then, upon an offer to return the tax certificate, refuses to pay back to Y the amount paid therefor by Y, with interest, etc.: *Held*, that the statute which provides that "no *account* against the county shall be *allowed*, unless presented within two years after the same accrued, (Gen. Stat. 264, § 47), does not apply so as to bar the claim of Y, on said tax certificate in two years. Opinion by VALENTINE, J. All the justices concurring. Affirmed—*County Commissioners of Saline County v. Young.*

WAIVER OF JURISDICTION—APPEALS—FILING APPEAL-BONDS OUT OF TIME.—1. If in an action pending before a justice of the peace, a judgment is rendered against a defendant, who has not been duly served with summons, as upon default, and such defendant appears within ten days from the rendition of the judgment, and presents an appeal-bond to be filed and approved by the justice, which is accordingly done, he thereby appears in the action and submits to the jurisdiction of the court, and can not afterward be allowed to deny such jurisdiction. 2. Appeals are favored, and mere technical defects or omissions are to be disregarded, as far as possible, without obstructing the course of justice. 3. Where a judgment is rendered before a justice of the peace, on December 14th, 1874, and the office of such justice becomes vacant by his removal from the township, and his dockets and papers are deposited with the nearest justice of the township,

and such justice receives an appeal-bond signed by the defendant, and a sufficient surety on December 24th, and within ten days from the rendition of the judgment, and then returns the bond by mail to the attorneys of the defendant, to have the surety justify, and receives the bond back, after the ten days has expired, but endorses the bond filed and approved of the date, he originally received the same. *Held*, that such filing and endorsement relate back to the time the bond was first received, and thereby the appeal is considered as perfect within time. Opinion by HORTON, C. J. All the justices concurring. Reversed.—*Haas v. Lees.*

ACTIONS AGAINST COUNTIES — PETITION — EVIDENCE.—1. Where a claim against a county for money is properly presented to the board of county commissioners, and they fail or refuse to take any action thereon, or, taking action thereon, fail or refuse to allow the same, the holder thereof may then commence an original action thereon against the county for the amount thereof. 2. And, in such action, it is not necessary that the plaintiff should set forth in his pleading that he had previously presented his claim to the county board for their allowance. Such presentation does not constitute any part of the plaintiff's cause of action. 3. Ordinarily the records of the county commissioners furnish the best evidence of the acts and proceedings of the county commissioners, but when such acts and proceedings amount in law to a contract, and this contract is for services or property or something of value to be furnished by the other party, and such contract has been executed by the other party, and the county has received the benefit of such services or property or thing of value, it would then not be proper to allow the county commissioners to defeat an action for such services or property or thing of value, merely because the county commissioners and their clerk had failed to do their duty by making their records show all their acts and proceedings. In such a case, where the records do not show said contract, but are silent with reference thereto, the contract may be shown by parol evidence. Opinion by VALENTINE, J.; all the justices concurring. Reversed. *Gillett v. Commissioners of Lyon County.*

MORTGAGE FOR PURCHASE-MONEY UNRECORDED, A PRIOR LIEN TO A JUDGMENT—JUDGMENT-CREDITOR'S RIGHTS TO BE ASSERTED BY SUIT—INJUNCTION.—1. B. obtained a judgement in the district court against S. Subsequently S., being indebted to P. upon a promissory note, for which was deposited as collateral security a note and mortgage given by D. upon real estate, made an arrangement with P. and D. by which the note and mortgage of D. were to be surrendered. D. was to deed to S. certain other real estate, and S. was to execute a mortgage thereon to P. to secure whatever balance might be due P. This arrangement was carried into effect, though, through some delay in executing papers, the mortgage to P. was not executed or recorded until five days after the deed from D. to S. had been recorded. After the record of the deed and mortgage, B. caused an execution to be issued on his judgment and levied on the property embraced in the deed and mortgage, and was proceeding to advertise and sell it as the unencumbered property of S., when P. brought this action to restrain such sale. S. had no property other than this real estate and was insolvent. *Held*, 1. That the mortgage to P. was given to secure the purchase-money of the property mortgaged; 2, that such mortgage was a prior lien to the judgment; 3, that such priority of lien was a fact not apparent on the record but shown only by matters *dehors* the same; 4, that B., as a judgment-creditor, had a right to have the interest of the mortgagor in the real estate seized and sold to satisfy his judgment, and that the statute provided a mode for reaching and selling such interest, which mode was not the ordinary process of seizure and sale upon execution. 5. That P. holding a lien prior in fact, but whose priority was not apparent on the record, could maintain an action to restrain an attempted sale upon execution of the property as the absolute property of the judgment debtor, unencumbered by any lien. Opinion by BREWER, J.; all the justices concurring. Reversed. *Plumb v. Bay.*

INJUNCTION—ILLEGAL HIGHWAY—LAYING OUT OF ROADS—JURISDICTIONAL FACTS—FINDINGS OF FACT.—1. A party purchased a tract of land over which was a road used and traveled upon by the public as a public highway, but which he claimed was so used and traveled upon without ever having been in any manner legally appropriated to the public use. After his purchase he attempted to fence up his tract of land and close up the road. The authorities resisted his attempt and prevented him from closing up the road: *Held*, that injunction to restrain them from further interfering with his closing up the road was a proper remedy. 2. The public acquire no right to the possession of a highway by mere prescription any sooner than an individual does to land he occupies. Use of a highway for five years vests no title to it in the public as against the prior owner, and if, at the end of five years, he attempts to take possession, and such attempt is resisted, an action of injunction is not barred by any statute of limitations. 3. Under the general grant of power in section 16 of the act concerning counties and county officers, (General Statutes, p. 257), "to lay out alter or discontinue any road," and in disregard of the proceedings prescribed in the statute concerning roads and highways, (General Statutes, ch. 89), the county commissioners have not power of their own motion and without a previous petition to cause a road to be laid out and opened by viewers by them appointed. 4. Where, neither upon the papers, nor the proceedings of the county board, does it affirmatively appear that at least twelve of the petitioners were householders, resident in the vicinity of the proposed road, and the proceedings are attacked directly by *petition in error*, the defect is fatal, and the proceedings must be set aside as void. Commissioners Waubaunsee county vs. Muhlenbacker, 18 Kansas. When attacked collaterally, the fact that such petitioners are qualified householders may be shown by testimony *aliunde* the record (Willis vs. Sproule, 13 Kansas, 257 and 264); and when no such testimony is offered, the party who produces the record, and rests upon it alone, has made out a *prima facie* case that the proceedings were void, and is entitled to judgment accordingly. 5. Findings of fact should not be recitals of testimony, but statements of the facts deemed by the court to have been proved by such testimony, and a recital in a finding that such evidence was or was not given may be entirely ignored. Opinion by BREWER, J.; all the Justices concurring. Reversed. *Oliphant v. Commissioners of Atchison County.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF COLORADO.

April Term, 1877.

HON. HENRY C. THATCHER, Chief Justice.
" EBENEZER T. WELLS, } Associate Justices.
" SAMUEL H. ELBERT, }

COMMON CARRIERS—SPECIAL CONTRACTS LIMITING LIABILITY.—A common carrier which receives freight for transportation, can not, by contract, exempt itself

from liability for negligence by it or its employees. The liability of a common carrier is, within certain limits fixed by law, independent of contract, and a contract which exempts it from liability for negligence or misfeasance is void as against public policy. The rule that the degree of care and diligence to be exercised by the carrier must be commensurate with the nature of the trust, is both just and salutary. When a common carrier accepts for transportation in the winter season delicate fruits to be shipped half across the continent, the character of his employment, independently of any contract, clearly implied that he will ship them in such cars, and exercise such diligence as may be reasonably necessary for their safe passage to their destination. Opinion by THATCHER, C. J.—*The Merchants' Dispatch & T. Co. v. Cornforth.*

PRACTICE—CERTIORARI—DIMINUTION OF RECORD—AMENDMENT BY CONSENT.—Where one party suggests a diminution of the record, and thereupon moves for a *certiorari*, alleging that the complete record will show an error of fact in the present record, if the other party offers to confess the alleged error of fact, and to have his confession of error entered of record, the court will accept such confession, amend the record by it, and allow such confession to supply the place of the *certiorari* and return. But the court will not refuse a *certiorari* for an alleged diminution of the record, upon the objection that the matter omitted is immaterial. The materiality of the alleged defect will not, in general, be inquired into on suggestion of diminution. It is unnecessary, however, that the court below should certify matters already before us. The writ will, therefore, direct the court below to certify the particular fact specified. Counsel for the motion are advised to frame the writ, for which a precedent may be found in 2 Cowen, 38-9. Opinion *per Curiam.*—*Comm. Las Animas Co. v. Bond.*

TOWN SITES ON PUBLIC LANDS—CHANCERY PLEADINGS—CROSS-BILL.—1. Claimants to lots in town sites on the public lands of the United States must derive their titles exclusively by and through the acts of Congress, the latest of which acts is the act of February 11, 1870. If either the complainant or respondent is entitled to such relief in the matter of such claim, it can only be granted pursuant to the provisions of said act of 1870. If neither the complainant nor respondent avers and proves a compliance with the requirements of this act, the court is without authority to decree that a deed be executed to either party. It must also be shown that the corporate authorities of the town complied with all the requisites of the acts of Congress. 2. It is a well settled rule in chancery pleadings that, when a defendant seeks specific relief, it must be sought by a cross-bill. Without it his rights can not be enforced. 3. The defendant, who becomes *pro hac vice* complainant, must, in his cross-bill, with the same strictness as the complainant in the original bill, display the grounds upon which he relies for the affirmative relief; excepting only, as it is an auxiliary suit, he is not required, as against the complainant in the original bill, to show grounds of equity to support the jurisdiction of the court. Opinion by THATCHER, C. J.—*Tucker v. McCoy.*

DISCHARGE OF SURETIES—PLEA OF TENDER BY PRINCIPAL—OF EXTENSION OF CREDIT.—1. A plea by a surety that the creditor extended the time of payment on a promissory note by agreement with the principal debtor "for a good and valuable consideration," and without the assent of the surety, is a bad plea. Such plea states only a legal conclusion. The plea should state *the facts* out of which the consideration arose, so that the court can determine the legal sufficiency of the alleged consideration. Upon demurrer to such a plea (omitting to set out the consideration), the court can not determine the sufficiency of the consideration, and must sustain the demurrer. 2. There is another reason why the consideration should be explicitly stated, namely, that the adverse party may not be surprised by the introduction of testimony at the trial, to prove a consideration not stated in the pleading. 3. A plea that the principal debtor, being solvent and prepared to pay at the maturity of the note, offered to pay the plaintiff the amount due thereon, which offer the plaintiff refused, and that thereafter the principal debtor became and remained insolvent, is not a good plea. As a plea of tender, it is defective, because such plea must aver an actual production and visible show of the money, unless the production of the money was waived, in which event the waiver must be pleaded, and it must be alleged that the defendant was about to tender. 4. Nor do these averments constitute, in any aspect, a valid defense for the surety. When the tender is actually made of the amount due, satisfaction of the debt is within the reach of the creditor; and good faith to the sureties requires that he should accept the money. Sureties are liable to the creditor, but their obligation is accessory to that of the principal, and if the creditor refuses to accept the money when tendered, he is guilty of a palpable omission of duty to the sureties, which discharges them from further liability. But to declare that a mere offer to pay, which chronic borrowers are in the habit of making, without a dollar in sight, operates to discharge the sureties, would be to announce a new and dangerous doctrine. 5. Where the verdict and judgment are for a larger sum than is laid in the *ad damnum* in the declaration, the plaintiff may cure the error by entering on the record a *remittitur* of the excess. Opinion by THATCHER, C. J.—*Winne v. Colorado Springs Co.*

POSSESSORY TITLES TO PUBLIC LANDS—ADOPTION OF THE COMMON LAW—CONSTRUCTIVE NOTICE OF A DEED.—1. A possessory title to public lands, under the laws of the United States and of Colorado, is not a bare and naked possession of lands, as at common law, but is a legal, inchoate title to land, which the possessor may perfect into a perfect title in fee. 2. There is an important difference between the case of the naked possession of land at common law and the possessory title to land in Colorado. At common law the bare possession of land without apparent right was a wrongful possession, having its origin in trespass and ouster, and was, therefore, viewed with disfavor by the courts, while the possessory title to land in Colorado is an original possession founded on right, and recognized and protected by statute. For many years after the settlement of Colorado, these possessory titles were the universal tenure by which titles to lands in Colorado were held. Upon the public faith in these titles, valuable improvements were made upon lands held under them, and great interests reposed for their security upon the validity of these titles. This is a part of the public history of our territory and state, of which the court must take judicial notice, and which it must consider in applying the doctrines of the common law to land titles in this state. 3. Such possessory title to land was not personal estate, but was a title to real estate, and, as such, descendible to the heirs of the possessor at his death. The common law has been adopted in Colorado only in so far as it is applicable to our existing conditions. Its rules, technical or otherwise, can not be allowed to imperil great interests. Our courts are bound to take judicial notice of the political and social condition of the country, and are equally bound to apply the rules of law and the principles of enlarged reason to the new circumstances of a people. Were statutory provisions wanting, we think

these considerations would afford safe and tenable ground upon which the descendibility of these titles might be maintained and vindicated. 5. We prefer, however, to rest our decision on statutory provisions. We see, as we can not but see, in all the territorial legislation upon the subject of possessory titles to land, a clear purpose upon the part of the legislature to raise the title by occupancy to the dignity of real estate, and to surround its tenure with all the safe-guards, its transfer with all the formalities, and its enjoyment with all the securities of a fee simple title. 6. The proposition that the record of a deed is constructive notice to all the world, is too broad an enunciation of the doctrine. Such record is constructive notice only to those who are bound to search for it, as subsequent purchasers or mortgagees, and all others who deal with it on the credit of the title, in the line of which the recorded deed belongs. There is nothing in the registry laws in force at the time of the record of the probate judge's deed, that would authorize the court to charge Richardson's heirs with notice of its existence or contents. 7. The general rule is, that a co-tenant of lands who buys in an outstanding title to the lands, is held, as to this transaction, as a trustee for his co-tenants; yet this rule does not apply to the case of co-tenants claiming possessory titles to lots in town sites on the public lands of the United States. In such case, each claimant must file his own claim or be forever barred; and one co-tenant is not bound to volunteer to act as an agent for his co-tenants, as to such claims of title. Opinion by ELBERT, J.—*Gillett v. Gaffney.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

September Term, 1876.

(Filed at Ottawa, June 22, 1877.)

HON. BENJAMIN R. SHELDON, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" JOHN SCHOLFIELD,
" PINCKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

MORTGAGE—RIGHT TO POSSESSION BY ASSIGNEE OF MORTGAGEE.—Although the assignee of a mortgagee has only an equitable title,—mortgages in this State not being assignable at law,—yet, after condition broken, he, being in possession of the real estate mortgaged, also being the holder of the note secured by the mortgage and the assignee thereof, can defend his possession, under the mortgage, against ejectment brought by the mortgagor, or those claiming under him by inheritance or by grant made subsequent to the mortgage. Opinion by DICKEY, J., reversing.—*Kilgour v. Gockley.*

NOTE—INDORSED IN BLANK — PRESUMPTION OF GUARANTY, HOW REBUTTED.—To rebut the presumption which this court has always recognized, that a note indorsed in blank is intended by the one signing as a guaranty, the proof must be clear and satisfactory as to a different intention. Proof that the name was put there for the purpose of becoming liable as security that the maker should be responsible for the payment of the note, and that the indorser refused to sign as a maker, will not rebut the presumption. Opinion by BREESE, J., reversing.—*Stowell v. Raymond.*

CONTINUANCE—SICKNESS OF COUNSEL.—It is not error to overrule a motion for continuance, after the trial is begun, the ground upon which it is asked being the sudden illness of defendant's counsel. The trial having begun, it is too late, and the only remedy being a motion for a new trial. But, upon such a motion being filed, and urged upon the ground of want of preparation of defendant, resulting from counsel's illness, the affidavits of counsel and defendant, accompanying the motion, must show affirmatively that, upon another trial, defendant could make a better showing. Opinion of DICKEY, J. *Porter et. al v. Triolo.*

BONDS UPON CONDITION—POWER TO SELL WHEN GIVEN AS COLLATERAL SECURITY.—The pledge of commercial paper as collateral security for the payment of a debt, does not, in the absence of a special power for that purpose, authorize the party to whom such paper is so pledged to sell the securities upon default of payment, either at public or private sale. A person holding property or securities in pledge occupies the relation of trustee for the owner, and as such is bound to proceed as a prudent person with his own. *Held*, that this rule applies with the same, if not with more force, to *bonds payable upon condition*. Opinion by DICKEY, J., reversing.—*The Joliet Iron and Steel Co. v. The Scioto Fire Brick Co.*

EMINENT DOMAIN—JURISDICTION OF EQUITY TO PREVENT USE OF PROPERTY UNTIL DAMAGES ARE PAID.—Equity will not assume jurisdiction to enjoin the use of a railroad upon a street until the adjoining land-owners' damages shall have been assessed and paid under the eminent domain act. The party complaining will be left to his action at law. Opinion by SCOTT, J., reversing and dismissing the bill; SHELDON, C. J., DICKEY and BREESE, JJ., dissenting, partly on the ground that the ordinance under which the track was laid impliedly made it a condition that the abutting land-owners should be paid their damages before laying of the track, and that equity should take jurisdiction to enforce performance of the condition.—*The Peoria & Rock Island R. R. Co. v. Schertz.* [See Evans v. M. I. & N. Rd., *ante*, 39.—Ed.]

TROVER—EVIDENCE OF THE VALUE OF GOODS—PRIVATE CORPORATIONS—NEW CONSTITUTION.—1. In an action of trover for cast steel ingots, the jury returning a verdict for plaintiff, and assessing the damages,—*held*, that no witness having testified as to the market value of cast steel ingots at the time of the alleged conversion, for the reason that they had no market value, it was not error to allow proof that steel made from these ingots was worth a certain sum per pound in market, and proof of how much it would cost to convert the ingots into marketable steel,—thus allowing the jury to make a fair approximation as to the value of the ingots. 2. Section 1, of article 11 of the Constitution of 1870, did not repeal, and was not designed to repeal the general law on the subject of private incorporations in force prior to the adoption of the Constitution. Opinion by BREESE, J.—*Meeker v. the Chicago Cast Steel Co.*

BILL OF EXCHANGE—NEGLECT TO NOTIFY THE DRAWER OF NON-PAYMENT.—In a suit on a bill of exchange by payee against the drawer, where the bill had not been paid by the drawee—*Held*, that to charge the drawer of a bill of exchange, upon the ground of non-acceptance or non-payment, it is essential that proof be made of prompt notice to the drawer of the failure of the drawer to accept or pay. This may be excused where the drawer is so situated that he can not be prejudiced by the want of notice. If confessedly the drawee had no funds of the drawer, or was so situated that the drawer could have no reason to suppose that the draft would be honored, a want of notice could do drawer no harm. But no such case is made here. It is sufficient, as it appears in evidence here, that the drawer, in good faith, *supposed* drawee was his debtor. Whether or not he was so, is not the

question. Opinion by DICKEY, J., reversing.—*Welch v. Taylor Manufacturing Co.*

SCINTILLA OF EVIDENCE.—Where the defendant was charged with deceit and there was evidence given, yet none tending to support the charge, the court below overruling a motion to exclude the evidence from the consideration of the jury: *Held*, that the motion should have been allowed. Whether there is any evidence tending to prove any given material allegation of a declaration, is a question of law for the court to determine. Where there is any one *essential* allegation of a declaration which has no proof tending to support it, it is the duty of the court to exclude from the consideration of the jury all the evidence in the case. By former rulings in this court, the circuit court can not order peremptorily a non-suit and a discharge of the jury. But this does not take away the power to instruct the jury that, under the evidence, there is no question of fact for them to consider. Opinion by DICKEY, J. *Poleman v. Johnson.*

INJUNCTION—MEMBER EXPELLED FROM BOARD OF TRADE.—Equity will not interfere, by injunction, to prevent the Board of Trade from interfering with the free exercise all the rights, privileges and franchises, including the right to enter the rooms and transact business, at the instance of a member who has been removed therefrom, and who had sued out a writ of mandamus to try the merits, but which will not for some time be fully determined. The writ of injunction is not given to obtain affirmative relief, but only preventive relief. In this case, the wrong, if any, has been perpetrated, and plaintiff's only remedy is at law, by mandamus. Neither can the injury, which plaintiff may suffer in the loss of profits he might make in the rooms of the Board of Trade, be regarded such a one, as would justify a court of equity to interfere by injunction. Opinion by CRAIG, J. *Baxter v. Board of Trade of Chicago.*

POWER OF COURT OF EQUITY TO ENJOIN PROCEEDINGS UNDER A SCHOOL DISTRICT ILLEGALLY ESTABLISHED.—On a bill filed by land owners interested, alleging that the trustees of schools of two adjoining districts had attempted to establish a new school district, composed of territory taken from both the old districts, that directors had been chosen for this supposed new school district; that the proceedings were irregular and illegal; that in contemplation of law no new district had been formed; that debts were about to be contracted for the new district, and asking for an injunction forbidding these directors or other public officers from recognizing the new district as having any legal existence;—*held*, that there were no grounds in the bill upon which to found jurisdiction in a court of equity, there being no allegations of fraud, mistake, accident, or irreparable damages; and that the legal existence of the new school district could be tested under the statute allowing an information in the nature of a quo warranto. Opinion by DICKEY, J.—*Renwick et al. v. Hall et al.*

MOTION TO DISMISS APPEAL WHERE CAUSE IS REMANDED TO COURT BELOW FOR A MODIFIED DECREE.—Where, on an appeal from a county court, the circuit court adjusted the account of an executor, adjudging that he pay a given amount to certain claimants, from which judgment the executor appealed to the supreme court, which reversed and "remanded the cause, with directions to modify the decree" in a respect indicated, and, upon the re-appearance of the case in the circuit court, the executor moved to dismiss his appeal from the county court, the circuit court refusing so to do, but modifying the decree in accordance with the order of the supreme court;—*held*, on an appeal by the executor assigning for error the refusal of the circuit court to permit him to dismiss appeal from the county court, that such a refusal was correct. Had the cause been remanded by this court for a new trial in the circuit court, then the executor could have dismissed his appeal at any time before the ending of the suit. Opinion by DICKEY, J.—*Hough v. Harvey et al.*

NOTES.

THE *Somerset* (N. J.) *Gazette* says: "Judges Dixon and Knapp of the supreme court have affirmed the decision of the Court of Sessions of Hudson County, declaring pool-selling in the State of New Jersey illegal. The Hoboken pool-sellers are under bail at present to appear before the grand jury of Hudson County, which will meet next month, and until then the business of pool selling in Hoboken will probably continue."

THE destruction of fish on the western coasts of England by means of dynamite, has become so great that the attention of Parliament has been drawn to it. The practice threatens to drive the most useful fish entirely from those waters. The practice has become so general that it is thought that nothing short of a highly penal statute can put a stop to it. But the difficulty to be encountered is a jurisdictional one: the shoals of fish which are being destroyed, lie for the most part beyond the marine league.

THE American Social Science Association, which this week held a general meeting at Saratoga, had on its programme, among other features, the following papers: "The Silver Question," by B. F. Nourse, of Boston; "Taxation," by Prof. W. G. Sumner, of Yale College; "Local Taxation," by William Ernot, Jr., of Boston; "Registration in the United States," by Elisha Harris, M. D., of New York; "Changes in Population," by Dr. Nathan, of Lowell; "The Relation of the United States to Each Other, as Modified by the War and the Constitutional Amendments," by Hon. J. Randoph Tucker, of Virginia; "Education in Southern States," by Gen. T. M. Logan, of Virginia; "The Tariff Question," by Horace White, of Chicago, and "Municipal Government," by Ex-Gov. John T. Hoffman, of New York.

THAT indefatigable interviewer, George Alfred Townsend, ("Gath") has been talking to Ex-Lieut. Gov. Johnson, of Missouri, or, rather, compelling Gov. Johnson to talk to him, and the "interview" is given in the *Graphic*. Gov. Johnson says, very correctly, "the attack on Judge Dillon excited indignation, and finally contempt, with the bar generally." He thinks "it was an accidental attack, but not the less to be deprecated, for the judiciary in the United States has come out of the demoralization of the times better than any class we have. The bar cannot afford to have a bad judiciary, and careless imputations on men like Dillon weaken the whole administration of the law. For that reason, as well as from Dillon's lofty character, in almost every western locality, the bar voluntarily came forward to impugn the impugner." He further says of Judge Dillon: "He was born, I believe, in New York State, and has lived long in the West, and is identified with it. He is large, of dark complexion, robust in mind and body, and of a trained method which, united with promptness and decision, produces the fullest results out of his physique. He can work long and do many things; but they are all well done, because he has method. On the bench, he is exacting, and does not delay justice. Lawyers must be ready, and trifling is not allowed. He is not staggered by public opinion, nor by personal attacks like that we have referred to. Dillon has also done much to create a literature of the law in the West. His 'Law of Municipal Corporations' is the best book on that subject. We have recently established a law journal in St. Louis, the first successful thing of the kind out there. Dillon has made important contributions to it. He stands very well with the Confederate element, and addressed his reply to the *Nation's inuendoes* to the Confederate Governor of Missouri, the accomplished Thomas C. Reynolds." Speaking of the civil suits against McKee, he thinks "the whole thing savors of inhumanity"—a point upon which public opinion here is divided. He also thinks the abuse of Justice Bradley is contemptible—a sentiment from which few right-thinking people will dissent.